

SURROGATE MOTHERHOOD: LEGAL ISSUES

by

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**Dedicated to Jakkie**

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Solo Deo Gloria.



## SUMMARY

Surrogate motherhood is one of the most controversial issues of our time. The increase in infertility and the shortage of babies available for adoption, have provided an incentive for research in assisted reproductive techniques. Rapid advances in this field have caught the legal system unprepared in many ways.

The object of this thesis is to investigate the legal aspects of surrogate motherhood. A background is provided by an in depth examination and analysis of the practice of surrogacy in foreign jurisdictions. For this purpose a selection of interdisciplinary, medical and juridical reports, court decisions and legislation is analysed.

The surrogacy agreement is affected by principles of both public and private law. As the agreement is based on consensus between the parties, Roman Law principles of the law of obligations, provided a valuable point of departure in establishing a theoretical basis for the classification of surrogacy agreements. Having determined the nature of the agreement, the content is analysed with due regard to statutory and other relevant considerations, such as the *boni mores*, and submissions made regarding the enforceability and legality of such agreements.

A surrogate mother agreement model is proposed and analysed in the light of existing South African law. The various ways in which surrogacy contracts may be breached are examined and recommendations put forward regarding possible delictual or contractual remedies.

The legal relationship between the surrogate child and its gestational (birth) mother and her husband on the one hand and the intended parents on the other is investigated. The role of the courts in custody issues - related to surrogacy - is examined and recommendations put forward as to how they may be included in the process by determining the best interest of the surrogate child prior to artificial insemination.

The civil and criminal liability of medical practitioners involved in assisted reproductive technology and specifically surrogacy are expounded. Key issues in the practice of surrogate motherhood are interpreted in the light of existing statutory and common law principles. Recommendations are put forward on these issues and a bill proposed for the regulation of surrogate motherhood in South Africa.

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## CHAPTER 1 ASSISTED REPRODUCTION AND SURROGATE MOTHERHOOD

### 1 INTRODUCTION

The problem of infertility is as old as civilisation itself and the despair often associated with the condition is captured in the desperate plea of Rachel to Jacob in the Old Testament in the Bible: "Give me sons or I shall die!"<sup>1</sup>

In our society children are often seen as a gift from God and it is therefore not surprising that the inability to have children is sometimes experienced as punishment. Receiving the news of infertility can be emotionally devastating for a couple and responses may vary from denial, isolation, anger, guilt and feelings of unworthiness, depression and grief to acceptance.<sup>2</sup>

- 
- 1 Genesis 30:1. Another example from the Bible is that of Sarah, who, approximately 4 000 years ago, when she was unable to conceive, sent her husband Abraham to the Egyptian slave, Hagar, so she could have a child for Abraham (Gen 16:2).
  - 2 For a discussion of the effects of infertility see Andrews L B 1984 *New Conceptions - A Consumer's Guide to the Newest Infertility Treatments* 96 - 101; De Jongh van Arkel J T "Die Pastorale Perspektief" in 1982 *Die Proefbuisbaba : Toekomsskok of Nuwe Burger?* Pieterse H J C (ed) 25 - 26; Wood C and Westmore A 1983 *Test-tube Conception* 35 - 38.

The biotechnological revolution and the discovery of new and better artificial reproductive techniques have created hope for childless couples who, previously, could only rely on adoption as an alternative method for obtaining a baby. Infertility clinics have been set up in most of the major centres in the world and in South Africa alone there are several at the large Medical Schools and a few private ones.<sup>3</sup>

The reason for the constant research incentive in this exciting yet sensitive field, is primarily due to the

---

3 Bernstein J 1989 **Yes We Can Have a Baby - A Positive Guide to Infertility** 48 provides the following information: During 1989 the following infertility clinics were operative in the provinces and academic hospitals:

**Transvaal:**

Baragwanath Hospital, Soweto  
 Coronation Hospital, Coronationville  
 GaRankuwa Hospital  
 H F Verwoerd Hospital, Pretoria  
 Hillbrow Hospital, Johannesburg  
 Johannesburg Hospital

**Orange Free State**

Universitas Hospital, Bloemfontein  
 Cape Province

Groote Schuur Hospital, Bellville  
 Tygerberg Hospital, Bellville

**Natal**

King Edward VIII Hospital, Durban  
 Addington Hospital, Durban.

increase in infertility<sup>4</sup> and the shortage of babies available for adoption.<sup>5</sup>

Couples to whom the advances in modern birth technology are beneficial are those with a medical history of genetic disorders, such as Tay-Sachs, Huntington's chorea or haemophilia, to name but a few. For those who marry or remarry late in life, but still have aspirations of having their own children, the new technological development may also be beneficial. Surgical procedures on either the male or female partner may also have reduced the possibility of having children and in some instances may even have resulted in total sterility - an inability of ever having children.

---

4 The causes for the increase in infertility vary widely. Some of the most common causes are drugs, often used for other purposes, such as DES (di-ethyl-stilbestrol), prescribed by doctors in the mid-1950's to prevent miscarriages. The daughters of these women are increasingly found to be infertile. Another drug, used for the treatment of ulcers, causes a suppression of the sperm count in men. Other causes are the use of IUD's in women to prevent pregnancy, a variety of infections; abortions performed under unsanitary conditions; pollution and environmental hazards such as chemical pollutants, which are responsible for lowering sperm counts in men and workplace hazards, such as contact with radio-active materials. For a detailed discussion see Andrews 1984 *New Conceptions* 16 - 31.

5 The shortage of children for adoption can be attributed to the fact that both abortion and contraceptives are more readily available. Single parenthood is also socially more acceptable than in the past. In South Africa it was estimated that approximately 150 000 people were infertile in 1981 while only 1 200 adoptions took place. See 1982 *Die Proefbuisbaba* Pieterse (ed) 28.

For childless couples who are hesitant to adopt children, either on account of sociological or other factors or merely because of the long waiting periods involved, the new birth technology provides the possibility of having a child who is biologically related to at least one of them within a reasonable time.

The parties' choice of procedure will depend largely on their physical, emotional, social and religious background.

#### 1.1. INFERTILITY

Infertility is an inability to conceive children. This may be due to numerous factors attributed to the male or female partner or a combination of factors.<sup>6</sup> It may also be limited to a certain period of time. The term "sub-fertility" is used to describe a reduced state of fertility, for instance a low sperm count in the male or blockage of the Fallopian<sup>7</sup>

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6 For a detailed discussion on the causes of infertility see: Fishel S and Symonds E M (eds) 1986 *In Vitro Fertilisation - Past Present Future* 18 - 26. See also Palm M T and Hirsh H L "Infertility and Sterility: Legal Implications of Artificial Conception" 1982 *Med Law* 43.

7 The uterine tube that conveys the egg, fertilised or unfertilised from the ovary to the womb.



tubes in the female, which may be rectified with medication or surgical procedures.<sup>8</sup>

If conception is still absent after one year of regular sexual intercourse, a doctor may diagnose a state of infertility.<sup>9</sup>

#### 1.1.1 CAUSES OF INFERTILITY<sup>10</sup>

There are multiple causes for infertility. These are normally divided into causes for male and female infertility. Infertility can be attributed to male causes in approximately 40% of the cases, cervical causes in 15%, uterine causes in 10% and tubal and peritoneal causes in 30%, ovarian causes in 20% and miscellaneous causes in 5%. The total incidence is greater than 100% because in some 35% of couples, infertility is of multiple etiology.<sup>11</sup>

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8 Wood C W and Westmore A 1983 Test Tube Conception 14.

9 Ibid.

10 See also indications for using artificial reproductive techniques infra.

11 Palm and Hirsh "Infertility and Sterility - Legal Implications of Artificial Conception" 1983 Med Law 43 with reference to Shane J Schiff I and Wilson E 1976 The Infertile Couple: Evaluation and Treatment 28 Clin Symposia 5:2 8.

The causes of infertility are not dealt with in detail as the subject is primarily of a medical nature and the objective of the thesis is to investigate the legal aspects of a particular curative procedure - artificial insemination or in vitro fertilisation linked to a surrogate gestational (birth) mother.<sup>12</sup> The causes of infertility indicating this procedure are linked to female infertility. They are primarily the absence of a uterus or inability to carry a baby to term - either because of a congenital disorder or surgical removal of the uterus.

Although statistical data may not be absolutely accurate as all cases of infertility are not recorded, it is estimated at approximately 10 - 15% of all couples.<sup>13</sup>

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12 The causes of infertility are discussed by Fishel and Symmonds 1986 *In Vitro Fertilisation - Past Present and Future* 17 - 26; Wood and Westmore 1983 *Test Tube Conception* 22 - 29.

13 Mallory T E and Rich K E "Human Reproductive Technologies: An Appeal for Brave New Legislation in a Brave New World" 1986 *Washburn L J* 460 with reference to Kramer "Last Chance Babies, the Wonders of In Vitro Fertilization" Aug 1985 *New York Mag* 34. Cappuccio M S "Surrogate Motherhood in Ohio: A Dangerous Game of Baby Roulette" 1985 *Cap U L Rev* 93, who is of the opinion that it occurs in one out of every seven couples. According to Andrews 1984 *New Conceptions* 2, infertility is estimated at approximately 15%, while it was only 10% in 1976. For her statistical data, she relied on research conducted by the National Centre for Health Statistics in 1965 and 1976. There is a 83% increase in infertility in married couples where the woman is in the age group 20 - 24 years. According to Condie K T "Surrogacy as a Treatment for Infertility"

(Footnote Continued)

In 1981 infertility affected approximately 150 000<sup>14</sup> of the South African white population of approximately 4,8 million people.<sup>15</sup>

## 1.2 ARTIFICIAL REPRODUCTIVE TECHNIQUES

### 1.2.1. ARTIFICIAL INSEMINATION

The term artificial insemination in a narrow sense, refers to a certain procedure, whereby gametes<sup>16</sup> (sperm) of the male are placed into the reproductive organs of a female with a procreative intent ("voortplantingsdoel"). In a broader sense, it includes in vitro fertilisation and denotes all forms of insemination which is not affected by sexual intercourse between a male and female.

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(Footnote Continued)

1986 J of the Law Society of Scotland 469, approximately 1/3 the problem of infertility may be traced back to either the male or female partner while approximately 1/3 of the causes of infertility is a combination of in both the male and female or as a result of unknown factors.

14 De Jongh van Arkel "Die Pastorale Perspektief" in 1982 Die Proefbuisbaba Pieterse (ed) 28. Dr C Sevenster formerly associated with the infertility clinic at the H F Verwoerd Hospital quoted similar figures for 1984 during a lecture on 26 January 1988 at the Glen Methodist Church Pretoria.

15 Population statistics obtained from 1987 This is South Africa, Bureau for Information Publication 12.

16 A gamete is defined in s 1 of the Human Tissue Act 65 of 1983 as: "either of the two generative cells essential for human reproduction".

The Human Tissue Act<sup>17</sup> regulates both forms of artificial reproduction and "artificial insemination of a person" is defined in s 1 of the Human Tissue Act<sup>18</sup> as:

"The introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including:

(a) The bringing together outside the human body of a male and a female gamete or gametes with a view to placing the product of a union of such gametes in the womb of a female person; or

(b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of a female person."

Another distinction may be drawn between artificial insemination with sperm from a donor (AID) and artificial insemination with the sperm from the husband. (AIH). Artificial insemination with sperm from the donor is

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17 65 of 1983 as amended by Act 106 of 1984. In 1989 the word "insemination" was substituted with "fertilization" in the English version of the Act (s 27).

18 Ibid.

frequently utilised in the practice of surrogate motherhood. In such instances the donor is the husband of an infertile/sterile woman and the recipient of the sperm is the surrogate mother.<sup>19</sup>

The first artificial conception was performed in England by John Hunter as long ago as 1799 and in the United States of America in 1866 by Dr J Marion Sims.<sup>20</sup> At present birth by this method accounts for approximately 3% of all births.<sup>21</sup>

#### 1.2.2 IN VITRO FERTILISATION

In this procedure, ripe ova are collected from the female patient with a needle using a laparoscopy procedure.<sup>22</sup>

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19 This is discussed in chapter 2 under the Parties to a Surrogate Motherhood Agreement.

20 Smith G P and Araola R "Sexuality, Privacy and the New Biology" 1984 Marq L Rev 263 n 2.

21 Davies I "Close encounters in a Test Tube" 1985 Med L J 166.

22 The laparoscopy procedure used for egg pick-up is normally performed under general anaesthesia. A small incisions is made in the umbilicus (belly button) through which a telescope-like instrument - capable of transmitting light in curved or irregular paths and of producing images by means of accessory lenses and mirrors - the laparoscope - is passed to view the ovaries. Another small puncture site is made in the lower abdomen along the hairline, through which fine forceps are passed to allow manipulation and positioning of the pelvic organs. A third puncture site is made between the first and second incisions which

(Footnote Continued)

These are fertilised with semen (either from a donor or her husband) in a laboratory (petri) dish, containing a growth medium. Fertilisation is thus effected outside the human body - in vitro. The embryos - three or four are ideally used<sup>23</sup> - may then be transferred to the donor's own uterus or to a surrogate/host mother. If the procedure is successful, one or more of them will attach to the uterine wall and the embryo will develop and grow in the ordinary fashion and the baby delivered in due course.

The pioneers in this field are R G Steptoe and P Edwards who were responsible for the birth of the first in vitro ("test tube") baby, Louise Brown, in England in 1978. The USA followed in 1981<sup>24</sup> and in South Africa, the first in vitro baby, Falcon de Vos, was born on April 29 1984 at the Tygerberg Hospital.<sup>25</sup>

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(Footnote Continued)

enables the surgeon to pass a teflon-coated needle into each mature follicle and to remove the fluid and the egg it contains. See Wood and Westmore 1983 *Test-tube Conception* 66 - 67; Grobstein C 1981 *From Chance to Purpose: An Appraisal of External Human Fertilization* 22 - 23.

- 23 Edwards R G "Use and Abuse of Research on Human Embryos" 1986 *Gynaecology and Obstetrics* Ludwig H and Thomsen K (eds) 700 - 701. This number was confirmed to be ideal by Drs M Jacobson, C Michaelo and C Sevenster (personal communication).
- 24 Smith and Iraola "Sexuality, Privacy and the New Biology" 1984 *Marq L Rev* 263 n 3.
- 25 Kruger T "Die Etiese Aspekte van In Vitro Bevrugting" 1986 *S Afr Med J* 593 - 594.

Nowadays the procedure whereby Louise Brown was born is sometimes referred to as "old fashioned" in vitro fertilisation (although it was barely a decade ago) as her own mother was both donor and gestational (birth) mother and semen from her own father was utilised.<sup>26</sup> In vitro fertilisation has introduced many possibilities regarding the donors of gametes or ova as well as the gestational mother and prospective or social parents.<sup>27</sup>

### 1.2.3 OOCYTE DONATION

This procedure involves the donation and transfer of ova<sup>28</sup> to the uterus of a woman who is incapable of producing them herself<sup>29</sup> or where the produced oocytes<sup>30</sup> lack the mobility

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26 Sperm and ova of "outsiders" may be used and after successful artificial insemination or in vitro fertilisation, the embryo may also be transferred to a host or surrogate mother. In some instances, as many as five people may have some form of parental rights to the child. See in general Wallis C "The New Origins of Life" Time 10-09-1984 cited by Dalgety and Prior in "Law and the Biological Revolution : Changes in Attitudes, behaviour, Medical Standards and Technology 1986 N Z L J 25.

27 Wallis cited in 1986 N Z L J 25.

28 The term ova is often used to denote fertilised oocytes, but it also denotes mature oocytes before fertilisation.

29 For instance in cases of genetically absent ovaries or premature menopause; see Fishel and Symonds 1986 In Vitro Fertilisation - Past Present and Future 25.

30 Egg cells as produced in the ovaries.

to reach the uterus<sup>31</sup> or contain some form of abnormality or potential abnormality which makes pregnancy undesirable.<sup>32</sup>

The possibility of oocyte donation is enhanced by the stimulation of oocyte production in women undergoing fertility treatment. If the woman becomes pregnant, she may want to donate surplus ova. The possibility of cryopreservation of excess or surplus ova in liquid nitrogen further facilitates this procedure. Women may also consider donating ova when they no longer want their own children and opt for sterilisation.

#### 1.2.4 EMBRYO FLUSHING (LAVAGE) AND TRANSFER

This technique is primarily used where a female patient has a healthy uterus but damaged or no Fallopian tubes. There are numerous causes for this condition for example following surgery, congenital disorders or diseases of the Fallopian tubes.

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31 Andrews 1984 *New Conceptions* 245.

32 Fishel and Symonds 1986 *In Vitro Fertilisation - Past Present Future* 25, distinguish between patients who are menstruating and those who are not. In the former category are, for instance, carriers of genetically transmitted diseases while congenital absence of the ovaries or premature menopause cause the absence of menstruation and inability to produce oocytes.



The requesting or commissioning couple conclude an agreement with a fertile woman whereby she is artificially inseminated with sperm from the commissioning male partner. If insemination is successful, the embryo is flushed from the uterus of the host or intermediate mother<sup>33</sup> and transferred to the wife of the commissioning couple who carries the baby in the ordinary way and gives birth in due course.

Another form of embryo transfer is where a woman is capable of producing oocytes, but is able to carry the baby only for a short period. Insemination may be effected *in vivo* (inside the reproductive organs), and the embryo then flushed out and transferred from the genetic to the surrogate or host mother. This is also referred to as SET (surrogate embryo transfer).

#### 1.2.5 EMBRYO DONATION

In the ordinary course of an *in vitro* programme, due to super ovulation,<sup>34</sup> the possibility exists of so called

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33 For an explanation of the term "host" or "intermediate" mother see the discussion in chapter 2.

34 The technique is sometimes employed by the administration of a hormone, clomiphene citrate or human menopausal gonadotrophin, which induces the female to produce a larger than usual number of ova; Trounson A and Leeton J et al "Pregnancy Established in an Infertile Patient After Transfer of a Donated Embryo" (Footnote Continued)

"supernumerary" or "spare" embryos. In most in vitro programmes, the number of spare embryos is restricted, but with the introduction of a freezing programme at some in vitro clinics, embryos may be kept frozen for future use by the infertile couple. If they, however, decide that they do not intend going on with the programme, or when the implantation resulted in a successful pregnancy, such embryos may be donated if they are healthy.<sup>35</sup>

#### 1.2.6 GIFT POST AND VISPER

These techniques have been developed over the last couple of years to help infertile couples. They can only be utilised in a woman with healthy Fallopian tubes. GIFT refers to Gamete Intra-Fallopian Transfer, POST to peritoneal oocyte and sperm transfer and VISPER to vaginal intra-peritoneal sperm transfer. In GIFT and POST eggs are collected and together with sperm from the husband or donor put directly into the woman's Fallopian tubes (GIFT) or into the peritoneum (POST). In VISPER only sperm is transferred directly into the woman's peritoneal cavity.

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(Footnote Continued)

Fertilised In Vitro" 1983 B M J 835; Edwards R G "Use and Abuse of Research on Human Embryos" 1986 Gynaecology and Obstetrics 691 - 692 Wood and Westmore 1983 Test Tube Conception 60.

- 35 See Edwards 1986 Gynaecology and Obstetrics 691 - 692; See also the discussion in chapter 6, the "Rights" to Embryos.

## 1.2.7 SURROGATE MOTHERHOOD

### 1.2.7.1 TERMINOLOGY

One of the meanings of "surrogate" in the Concise Oxford Dictionary is "substitute," whereas according to Webster's New World Thesaurus it is synonymous with an agent (intermediary) or a delegate. Used in the context of modern birth technology, the term is a new one and was practically unknown a decade ago. Linked to the word "mother" it has the meaning of a woman who has agreed to bear a child for another woman who is unable to do so herself.<sup>36</sup> The surrogate mother is sometimes also referred to as a "host" mother, especially where she merely carries the foetus for a while (embryo flushing)<sup>37</sup> or carries a foetus for a full pregnancy period and gives birth to the baby. The embryo may be conceived in vitro with gametes from the commissioning couple or with gametes from donors. If this is the case, the surrogate makes no genetic contribution to the child. The word, "gestational" mother is sometimes used to refer to the woman giving birth to the baby. Various possibilities thus

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36 Referred to in Afrikaans as "instaan-moeder," "gasmoeder" or even "leenma."

37 This situation does not give rise to the typical problems associated with surrogate motherhood, which is the subject of this thesis. A problem which may, however, occur is where flushing is unsuccessful and the host mother is saddled with an unwanted pregnancy.

exist with regard to the type of surrogacy utilised. Unless specifically otherwise indicated, this thesis is concerned with partial surrogacy, where the surrogate is inseminated with sperm from the commissioning father - also referred to as "surrogacy in its original form" and full surrogacy where the sperm and ova utilised are obtained from the commissioning couple and no genetic link exists between the child and the surrogate mother. This is often referred to as "gestational surrogacy". In both instances there will thus be a genetic link between the commissioning couple and the child.

The basic surrogate motherhood agreement involves an agreement between a commissioning<sup>38</sup> couple (intended parents) and a surrogate mother whereby the surrogate agrees (i) to be artificially inseminated with sperm from the commissioning male (intended father) and to carry the baby to term and hand it over to the commissioning couple (intended parents) after birth or (ii) agrees that embryos resulting from fertilisation of the commissioning couple's own genetic material (sperm and ova) in vitro, be transferred to her uterus.

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38 Referred to in Afrikaans as "wensouers," "kontrakterende egpaar" or "kinderlose egpaar".

In the former instance, the surrogate mother is also the genetic mother of the child.

### 1.3 INDICATIONS FOR UTILISING ARTIFICIAL INSEMINATION TECHNIQUES

#### 1.3.1 ARTIFICIAL INSEMINATION

Although artificial insemination is employed in surrogate motherhood cases, it is normally utilised as an alternative reproductive method for male infertility, such as impotence, azoospermia (absence of sperm) and oligospermia (low sperm count). Blood (Rh)-incompatibility and genetically transferable diseases such as Huntington's chorea or Tay-Sachs disease are also important factors in considering artificial insemination as an alternative reproductive method.<sup>39</sup> It may also be used if antibodies are formed by the female partner acting against the sperm of the male and as a final resort when conventional infertility treatment fails.

Infertility in males may be caused by environmental factors such as excessive radiation, for instance, from cancer treatment, exposure to certain chemicals such as the so-called "agent orange" used for military purposes or drug abuse.

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39 Andrews 1984 *New Conceptions* 162.

### 1.3.2 IN VITRO FERTILISATION

In vitro fertilisation is specifically indicated for females suffering from Fallopian tube disorders or who have no Fallopian tubes. In fact, in vitro fertilisation has been used to respond to all causes of female infertility, except for anovulation (inability to produce oocytes) and the absence of a uterus.<sup>40</sup>

It is estimated that approximately 40% of infertility in females can be traced back to Fallopian tube disorders, and in the USA alone it is estimated that approximately 490 000 females fall within this category.<sup>41</sup> The causes are varied, but may be ascribed to infections, genetic and other diseases, post-surgical complications or complications resulting from utilisation of intra-uterine devices (IUD's) for birth control purposes.

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40 See Johnson et al 1981 In Vitro Fertilisation: The Challenge of the Eighties 36 cited in the 1985 Report on Human Artificial Reproduction and Related Matters - Ontario Law Reform Commission Vol 1 24 n 42; Van der Merwe J V Irsigler U M et al "In Vitro Fertilization and Embryo Transfer in Pretoria" 1984 S Afr Med J 641 citing Lopata A Kellow G N Johnston W I H et al "Human Embryo Transfer in the Treatment of Infertility" 1981 Aust N Z J Obstet Gynaecol 156 - 158.

41 Andrews 1984 New Conceptions 123.

Certain forms of infertility do not respond to any form of conventional treatment, such as medication or surgical intervention. In vitro fertilisation may then be utilised as a final alternative. In vitro fertilisation and embryo transfer are also sometimes employed in the treatment of male infertility, where the number, movement or structure of the sperm is considered abnormal.<sup>42</sup>

### 1.3.3 SURROGATE MOTHERHOOD

The surrogacy procedure is discussed in detail in chapter 2.

The services of a surrogate mother may be utilised if the commissioning or infertile female is unable to carry a foetus - either for a short period or at all - as a result of a congenital or other abnormality or surgical removal of the uterus. It may also be the only alternative where pregnancy is too risky, for instance blood (Rh)-incompatibility, severe high blood pressure or diabetes. Other important factors are genetically transferable diseases such as Huntington's chorea, Tay Sachs disease, Down's syndrome or haemophilia.

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42 Leeton J F, Trounson A and Wood C "IVF and ET: What it is and How it Works" in 1982 *Test-Tube Babies* Walters W and Singer P (eds) 3.

#### 1.4 OVERVIEW AND OBJECTIVE OF THE THESIS

The purpose of this thesis is to investigate the legal aspects of the practice of surrogacy as an alternative method for infertile couples of acquiring a baby who is at least related to one of the parents.

The subject is approached in the following manner:

Chapter 2 consists of an examination of surrogate motherhood as a new reproductive alternative. A distinction is drawn between the various forms of surrogate motherhood. The parties to a surrogacy agreement are discussed and special attention is given to the motivations of potential surrogate mothers. Suitability and screening of the parties to such an agreement as well as the role of psychiatrists, are examined. In the second part of chapter 2 the practice of surrogacy in foreign jurisdictions is examined with special reference to major governmental or state reports on human-assisted reproduction. Guidelines issued by medical societies or associations are also examined. Court decisions in certain foreign jurisdictions such as Britain and the United States of America are discussed and legislation and proposed legislation on the subject in certain foreign jurisdictions, such as Britain, some states in the United States of America, some states in Australia and Germany are analysed.



In chapter 3 delictual and contractual aspects are examined. The surrogacy agreement in its present form is analysed in the historical context of the classification of contracts in Roman law in an attempt to establish a sound theoretical basis for the agreement in our legal system. The nature of the agreement as well as the legality and enforceability of such an agreement, with special attention to the *boni mores*, is examined. Breach of contract and possible remedies - delictual and contractual - are discussed.

In chapter 4 a proposed surrogacy agreement model is analysed.

Other private law aspects - particularly affecting the law of persons - are discussed in chapter 5. These include common law and statutory law issues. Genetic and legal relationships between parents and children are discussed in the light of new technological developments related to assisted reproduction, which may enable as many as five persons to claim some form of parental rights to one child. The *mater semper certa est* statement and *pater is est quem nuptiae demonstrant* maxim are examined in the light of their validity with regard to new developments in this field. Parental power and its termination - especially in surrogacy arrangements - are discussed. The welfare principle or best interest of the child criterion and its application in our courts are analysed.

In chapter 6 the role and possible civil and/or criminal liability of medical practitioners in assisted reproduction technology and surrogate motherhood are examined. The doctrine of informed consent and the extent of its applicability in surrogacy is examined. The nature of the "rights" to gametes, zygotes and embryos is analysed on a comparative law basis, to determine the rights of donors as well as persons who have zygotes or embryos in storage (cryoconservation). As these aspects have received scant attention in South Africa, recommendations are put forward for the management of the cryoconservation of zygotes/embryos and the content of the agreement which should exist between the storage facility and the intended parents.

In chapter 7 various theoretical approaches regarding the practice of surrogacy are analysed in an attempt to find an approach suitable for the regulation of surrogacy in South Africa. Key issues are addressed separately and recommendations put forward regarding each issue. In the final instance a bill, the **Surrogacy Agreement Bill**, is proposed for the regulation of surrogacy in South Africa.

## CHAPTER 2 SURROGATE MOTHERHOOD: AN INTRODUCTION AND A COMPARATIVE EVALUATION OF SURROGATE MOTHERHOOD IN FOREIGN JURISDICTIONS

### 1 INTRODUCTION

Surrogate motherhood as an alternative to adoption was virtually unknown before 1978,<sup>42</sup> when Louise Brown, the first in vitro baby was born. This event sparked renewed interest in modern birth technology and opened the door to new possibilities of obtaining babies related to at least one of the parents. What was previously considered science fiction has now become a medical reality.

Although it is difficult to ascertain the number of children born by utilising surrogate motherhood, it was estimated at approximately 500 during the period between 1978 and 1985.<sup>43</sup> A more recent estimate has put it at 1 200 children since 1978.<sup>44</sup>

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42 Handel W and Sherwyn B A "Surrogate Parenting: Coming to Grips With the Future" 1982 Trial 56.

43 Gelman and Shapiro "Infertility: Babies by Contract" *Newsweek* 04-11-1985 74, cited by Dalgety D J and Prior M in "Law and the Biological Revolution: Changes in Attitude, Behaviour, Medical Standards and Technology" 1986 N Z L J 25.

44 Special report on surrogacy in *The Detroit News* 17-09-1989.

Surrogacy raises many ethical, medical, religious and legal questions. There are serious pitfalls inherent to such an agreement and couples considering this option of childbearing should be alerted to potential problems. The future of surrogate motherhood is still uncertain in many countries as very few legislatures have addressed the issue directly. Legal precedents are limited and common law principles do not provide adequate answers to all the problems raised by the procedure.

In this chapter the emphasis is on an analysis of the parties to a surrogate motherhood agreement and the state of surrogate motherhood practices in foreign jurisdictions. For this purpose, reports of the major commissions which addressed surrogate motherhood specifically, are examined as well as the views of the medical profession in foreign jurisdictions as stated in reports and published guidelines. Court decisions in the major jurisdictions, such as Britain and the USA are examined in an attempt to analyse the criteria used by judges in the absence of direct legislation on the issue. Finally, legislation and proposed legislation are examined and evaluated. Here and there reference will also be made, for comparative purposes, to South African law.

## 2 INDICATIONS

The indications for surrogate motherhood have already been touched on briefly in chapter 1.

Surrogate motherhood may be used where a female is unable to produce oocytes or to carry a baby to term. This may be due to the congenital absence or other abnormalities of the uterus or to the surgical removal of the female reproductive organs.

In situations where pregnancy carries an abnormally high risk, such as blood (Rh)-incompatibility, severe high blood pressure or diabetes, surrogacy may also provide an alternative. For carriers of genetic diseases such as Huntington's chorea, Tay Sachs disease, Down's syndrome or haemophilia, surrogacy may also be indicated.

## 3 FULL AND PARTIAL SURROGACY

In an ordinary surrogate motherhood contract, an agreement is reached between a couple who are not capable of producing their own children in the normal way, and the surrogate mother who undertakes to bear a child for them and to hand it over to the commissioning couple after birth, terminating any parental power she may have over the child.

For practical purposes a distinction is drawn between full and partial surrogacy. As indicated in chapter 1, the genetic material (sperm and ova) are provided by the commissioning couple (intended parents) in full surrogacy and the surrogate merely acts as a host or gestational mother. In partial surrogacy the surrogate is artificially inseminated with semen from the commissioning husband (intended father) and thus contributes genetically to the child. The majority of surrogacy cases before the American and English courts, were cases of partial surrogacy and only two American cases on full surrogacy could be traced.<sup>45</sup>

As far as procedure is concerned, partial surrogacy may be accomplished without medical expertise or specialised hospital facilities. In full surrogacy on the other hand, in vitro fertilisation is utilised. This delicate procedure requires professional skill, special equipment and sophisticated hospital facilities. Theoretically, it may

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45 **Smith v Jones** 85-532014 DZ (3rd Jud Dist Mich 14 March 1986) reported by Annas G J "The Baby Broker Boom" 1986 **Hastings Center Rept** 30; "Parentage Decided for Unborn Child of Surrogate Mother" **American Medical News** 04-04-1986 19 as quoted by Eaton T E "Comparative Responses to Surrogate Motherhood" 1986 **Neb L Rev** 686 690 n 10; De Marco D "The Conflict Between Reason and Will in the Legislation of Surrogate Motherhood" 1987 **Am J Juris** 26 - 27; **Johnson/Calverts** reported in **Newsweek** 27-08-1990; **Time** 27-08-1990.

therefore be easier to prohibit or regulate the practice of full surrogacy than partial surrogacy.<sup>46</sup>

Full surrogacy may also be more beneficial to the child from a psychological point of view as it is genetically related to both parents. On the other hand, the child in partial surrogacy is genetically linked to the surrogate mother who undertakes to hand the child over after birth, terminating her parental power over the child. The genetic or biological parents in partial surrogacy are therefore from two different families - a fact which has the potential of creating problems similar to those experienced by adopted children. This leads one to the assumption that it will probably be easier for the gestational mother in full surrogacy to hand the child over to the commissioning couple at birth than for a genetic mother.

### 3.1 THE PARTIES TO A SURROGATE MOTHER AGREEMENT

The parties to a surrogacy agreement are the commissioning<sup>47</sup> or childless couple on the one hand, and the surrogate

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46 See in general Singer and Wells 1984 *The Reproductive Revolution: New Ways of Making Babies* 128 - 130. See also chapter 7.

47 For practical purposes the commissioning couple are referred to as the intended parents, once a surrogacy agreement has been concluded.

mother and her husband, on the other.

Although the commissioning couple is sometimes referred to as the infertile couple, this is not necessarily the case as the husband of the commissioning couple is generally fertile, and genetic father of the child in both partial and full surrogacy.<sup>48</sup>

The commissioning wife is either sterile or experiences some fertility problem which precludes her from either contributing ova or carrying a foetus to full term.

The surrogate mother is generally a married woman, although unmarried women are not precluded from being surrogate mothers in most of the American states.<sup>49</sup> (Reg 8(1) of the South African Human Tissue Act Regulations<sup>50</sup> clearly provides that artificial insemination may only be performed on married women with their husbands' written consent).<sup>51</sup>

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48 Mady T M "Surrogate Motherhood: The Legal Issues" 1981 Am J L & Med 323 at 338.

49 For a detailed discussion on the subject see Kritchevsky B "The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family" 1981 Harv Women's L J 1 - 42.

50 R1182 GG 10283 - 20-06-1986.

51 This aspect is dealt with in chapter 6 under Informed Consent.



The husband of the surrogate mother is also a party to the contract as he has to consent to the medical procedures and the termination of parental power.<sup>52</sup>

#### 4 THE QUESTION OF MOTHERHOOD

This aspect is discussed in more detail in chapter 5 where legal problems relating to the law of persons are discussed. This is, however, one of the most problematic aspects of surrogacy and therefore demands some preliminary reflection.

Whereas the *mater semper certa est* statement<sup>53</sup> in our common law, previously provided the assurance that the mother is always certain, this is no longer the case.<sup>54</sup> Hypothetically it is now possible for at least three women to claim some

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52 Termination of parental power is dealt with in detail in chapter 5.

53 As Schutte M Die Hervorming van die Regsposisie van Buite-egtelike Kinders met Besondere Verwysing na die Status van Kinders deur Kunsmatige Bevrugting Verwek LLD Unisa 1986 147 points out, this was merely a statement of fact in our common law, as there was no possibility at that stage that anyone other than the gestational mother, could be the genetic mother of the child. It is therefore not a rebuttable presumption such as the presumption of paternity. It precedes the well-known presumption of paternity in Digesta 2 4 5 of the Corpus Iuris Civilis: "*quia semper certa est. etiam si vulgo conceperit: pater vero is est, quem nuptiae demonstrant*".

54 See in general Van Wyk A H "Mater Hodie Semper Incerta Est? 'n Evaluasie van Artikel 5 van die Wet op die Status van Kinders van 1987" 1988 TSAR 465 - 476.

form of parental rights to a child. If Mrs A is infertile and Mrs B agrees to provide ova to be fertilised in vitro with semen from Mr A, and embryos are transferred to Mrs C, who agrees to carry the baby to term and hand it over to Mrs A and her husband after birth, the situation becomes extremely complex and the basic tenets of family law uncertain. Who is the legal mother of the child? Is it Mrs A whom the legal and medical literature refers to as the commissioning, infertile or social mother? Is it Mrs B, the genetic mother? Or is it Mrs C, the gestational or birth mother?<sup>55</sup>

This example provides adequate proof of the confusion in parental roles created by the advances in modern birth technologies such as artificial insemination, in vitro fertilisation, embryo transfer and surrogate motherhood. We are faced with the possibility of numerous persons claiming parental rights to a child and our traditional definitions of mother and father are no longer adequate.<sup>56</sup> Courts are

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55 See also Lupton M L The Legal Consequences of Artificial Insemination and Embryo Transplantation in Humans D Phil Univ of Natal 1982 108; Schutte 1986 Hervorming 146 - 147 and 149 - 150.

56 See the discussion in chapter 5 under Common Law Statements and Maxims. See also Wadlington W "Artificial Conception: The Challenge for Family Law" 1983 Symposium on Bio-Medical Ethics 1983 Va L Rev 465 - 514; Stumpf A "Redefining Mother: A Legal Matrix for New Reproductive Technologies" 1986 Yale L J 187 - 207;  
(Footnote Continued)

increasingly faced with novel legal problems and unguided by direct legislation, incline to rely on traditional legal principles which may no longer be adequate.

In South Africa, parenthood has traditionally been determined on a biological basis.<sup>57</sup> It is submitted, however, that the psychological intent of the parents in a surrogacy arrangement transcends the notion that biological ties should be the only criterion for parenthood (in the absence of legislation). The psychological (and legal) intent of the parties to such an agreement are that the commissioning couple (intended parents) should be considered the legal parents of the child. The intent of the parties is a fundamental element recognised in our law and should also be recognised in surrogacy agreements.

Another common law principle which has created a number of legal problems is the transfer of parental power. Although this issue is discussed in depth in chapter 5, a few preliminary comments are necessary. As a result of modern birth technology, as many as five persons may claim some

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(Footnote Continued)

Barnett D L "In Vitro Fertilization: Third Party Motherhood and the Changing Definition of Legal Parent" 1985 Pac L J 231 - 259.

- 57 South African Law Commission report Project 38 "Ondersoek na die Regsposisie van Buite-egtelijke Kinders" Oct 1985 55; Lupton 1982 Legal Consequences 224 and 230; Schutte 1986 Hervorming 144.

form of parental rights to one child.<sup>58</sup> Both the British and American courts have been faced with requests for determining or terminating parental power and in some instances have avoided the issue or have refused to do so on the strength of traditional legal principles in the absence of clear legislation. This may be detrimental to the child, as the duty of maintenance of the child and other obligations can definitively be established only once the legal parents of the child have been ascertained. It is submitted that parenthood should be established prior to the birth of the child.<sup>59</sup>

## 5 THE QUESTION OF PATERNITY

Paternity is also discussed in greater detail under legal problems relating to the law of persons in chapter 5 where the presumption of paternity or *pater is est quem nuptiae demonstrant* is discussed.

It must be noted however, that the common law presumption of paternity complicates surrogacy arrangements, as the husband of the surrogate, if she was married, was presumed to be the father of the child and not the intended father. This

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58 See Wallis C "The New Origins of Life" *Time* 10-09-1984 cited by Dalgety & Prior 1986 N Z L J 25.

59 See the Recommendations in chapter 7.

presumption was rebuttable<sup>60</sup> under common law, but legislation in several jurisdictions<sup>61</sup> have entrenched the presumption and the South African legislature has followed suit in enacting s 5 of the Children's Status Act.<sup>62</sup>

## 6 THE MOTIVATION OF SURROGATE MOTHERS

The attitudes motivating women to act as surrogate mothers are varied and in some instances, complex. In an American survey<sup>63</sup> 125 prospective surrogate mothers were interviewed and data collected and tabulated in an attempt at "helping participants in the process and policy makers to make reasonable and informed decisions about the process".

Some of the most interesting facts that came to light are the following:

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60 Van Lutterveld v Engels 1959 2 SA 699 A.

61 This is enacted in the American Uniform Parentage Act 59A ULA 592 (1979) which has so far been adopted by 16 American states according to Clark N L "New Wine in Old Skins: Using Paternity Suit Settlements to Facilitate Surrogate Motherhood" 1986 - 1987 J Fam L 483 484 n 2. See also s 27 of the British Family Law Reform Act of 1987 and s 5 of the Status of Children (Amendment) Act 1984 of Victoria, Australia. See in general Dickens B M "Artificial Reproduction and Child Custody" 1987 Can Bar Rev 67 - 69 for the position in the Canadian provinces.

62 82 of 1987. See the discussion in chapter 5.

63 See in general Parker P J "Motivation of Surrogate Mothers: Initial Findings" 1983 Am J Psych 117 - 118.

The average age of women ranged between 18 and 38. Of the applicants 56% were married, 20% divorced and 24% had never been married. Of the first 50 applicants, slightly more than 20 (40%) were unemployed at the time of the interview and were receiving some form of financial aid. Almost 60% of the applicants were working or had a working spouse. The total annual income of the families ranged from \$6 000 to \$55 000. Of the first 50 interviewed, the majority (54%) had graduated from high school or received a General Equivalency Diploma, while 18% had not completed high school. Twenty six percent had received College or University education.

The basic motivation for some women are sentimental or basic maternal instincts. These women claim that they enjoy the being pregnant and giving birth to a child. Others are prompted by altruistic reasons, based on a genuine desire to help an infertile couple or family members to have a child of their own. Some engage in surrogacy to resolve internal psychological conflicts such as feelings of guilt stemming from a prior abortion. In fact, the survey revealed that 35% of the women either previously had a voluntary abortion or had relinquished a child for adoption. Others are merely motivated by the prospect of financial reward. In the American survey the majority of women (89%) required a fee for their participation in a surrogacy programme. None of the women, however, stated that the fee alone was a prime motivation and in most cases it was accompanied by

therapeutic or altruistic motivations. During 1983 the average compensation for a surrogate in the United States varied between \$10 000 and \$30 000. It has also been reported that between 1978 and 1989 approximately \$33 million had been spent on surrogacy arrangements in the USA alone.<sup>64</sup>

The results of the survey provide adequate proof that very few women will be prepared to act as a surrogate mother without compensation. This is perfectly understandable if one considers the basic expenses involved in pregnancy such as maternity wear, transport, regular medical examinations, laboratory tests and hospital fees which can amount to a considerable sum of money. For these reasons, it is submitted, that should surrogacy practices be allowed, the surrogate mother should receive some compensation to cover her basic expenses (and possibly also loss of income) analogous to compensation of a sperm donor for necessary expenses. A maximum amount may be determined legislatively. The aspect of compensation is, however, dealt with in more detail in the discussion of the *boni mores* in chapter 3, since that is also one of the crucial issues in surrogate motherhood.<sup>65</sup>

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64 The Detroit News 17-09-1989.

65 For a detailed discussion, see chapter 3.

## 7 SUITABILITY OF THE PARTIES TO A SURROGACY AGREEMENT AND SCREENING

### 7.1 INTRODUCTION

The mental and physical suitability of the parties is one of the most important aspects of the surrogacy agreement as the ultimate success and protection of the interest of the child depend largely upon the attitudes and maturity of the parties. In most instances the commissioning couple, who request surrogacy, have been through a long period of infertility testing, which should provide a medical practitioner some time to assess their attitude and suitability to enter into a surrogacy agreement.

Medical practitioners, psychiatrists and other health-care workers play an increasingly important role in the evaluation and screening of potential surrogates and infertile couples.<sup>66</sup>

At present the suitability of the parties is in the main determined by medical practitioners who are sometimes assisted by social workers or other health-care workers.

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66 See in general Slovenko R "Obstetric Science and the developing Role of the Psychiatrist in Surrogate Motherhood" 1986 J Psychiatry & L 487 - 518.



Interdisciplinary ethics committees or a supervisory surrogacy tribunal, could play a significant role in the evaluation process. Should surrogacy legislation be adopted at a future stage in South Africa, a legal criterion will have to be formulated for suitability, and information derived from medical experience will be invaluable.

## 7.2 ASSISTANCE BY PSYCHIATRISTS/PSYCHOLOGISTS

The eligibility for infertility treatment received considerable attention in the Warnock Report in Britain.<sup>67</sup> It was concluded that, in general, everyone should be entitled to seek expert advice and appropriate investigation of their fertility.<sup>68</sup> Where a medical practitioner experiences problems in reaching a decision whether a patient should receive infertility treatment, he/she should consult with psychiatrists, psychologists or social workers. As stated in the Warnock report<sup>69</sup> situations could be envisaged where infertility treatment would not be in the best interest of the patient, the child that may be born or the patient's immediate family. The decision not to treat a patient is not always a purely medical one and other

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67 At 2.5 et seq of the report.

68 At 2.12 and 2.13 of the report.

69 At 2.12 of the report.

professionals in related fields could alleviate the burden of reaching a decision on this aspect. Counselling could, for instance, be provided by a psychiatrist or psychologist and recommendations be made to the medical team. This may be particularly helpful where the infertility specialists are not well acquainted with the patients. It is, of course, preferable that both parents and the surrogate mother have stable marriages and that they are emotionally equipped to cope with the stress inherent in assisted reproduction procedures. In surrogacy arrangements the experience and skill of a psychiatrist or psychologist could be helpful in the screening of the intended parents and the surrogate mother.

In the *Baby M II*<sup>70</sup> case in the USA the absence of counselling, prior to termination of parental rights, was specifically addressed. The court found that the contract did not provide for counselling, independent or otherwise, of the natural mother.<sup>71</sup> According to Rothenberg<sup>72</sup> the lack of counselling reinforced the court's determination to void the agreement. The surrogate mother, Mrs Whitehead, had

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70 In re *Baby M* 14 FLR 2007 N J Sup Ct (1988).

71 At 2016 of the report.

72 "Baby M, the Surrogacy Contract, and the Health Care Professional: Unanswered Questions" in 1988 *Law, Med & Health Care* 113 - 120.

apparently been "screened" two years prior to the agreement. The "examiner" had some misgivings at that stage about her ability to hand over the child at birth. He apparently suggested that this aspect be explored in more depth, which never happened. She was nevertheless recommended as an "appropriate candidate" and the commissioning couple, the Sterns, in fact relied on this information when they signed the contract.<sup>73</sup>

The role of psychiatrists in surrogacy arrangements has received considerable attention in legal and medical publications in the United States of America. Suggestions as to their role in surrogacy agreements have been made. Possibilities mentioned included the following: (1) facilitator of informed consent, (2) "gatekeeper", (3) protector of the foetus, (4) therapist, and (5) researcher.<sup>74</sup> Parker<sup>75</sup> provides a detailed analysis of the possible role of the psychiatrist in surrogacy arrangements. According to him, the principal task of the psychiatrist is to assist the intended parents and the surrogate mother in

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73 At 2008 of the report.

74 Slovenko 1986 J Psychiatry & L 487.

75 "Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry" 1982 Int'l J L & Psychiatry 341 - 354 and "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy" 1984 Bull Am Acad Psychiatry L 21 - 38.

reaching a "competent, voluntary and informed choice (consent or refusal) with respect to their participation in the process".<sup>76</sup> Slovenko<sup>77</sup> is concerned that "(g)iven the legal ambiguity, and the negative stance taken by the AMA,<sup>78</sup> the psychiatrist or other mental health professional who gets involved in the process is likely yet again to be made a scapegoat". The major decisions (in surrogacy), according to him, are not psychiatric but societal. Slovenko's advice to mental health professionals is to "stay out of the picture at least until his or her role is clarified or supported by legislation or ethical standards of the profession". Although this is undoubtedly good advice in a situation of legal uncertainty, it is a pity that childless couples, who already experience considerable anguish resulting from infertility, should be denied the help of mental health professionals. It is therefore suggested that provision should be made for them to assist a couple or a surrogate, should it be required.

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76 Parker 1982 Int'l J L & Psychiatry 352.

77 1986 J Psychiatry & L 487.

78 American Medical Association. The views of this Association on surrogacy have, however, shifted from a conservative to a much more liberal approach as is evident from the 1990 guidelines, published by the organisation regarding surrogacy. See the discussion *infra*.

An examination of the practice of surrogacy in the United States of America reveals that screening of the parties is regarded as of the utmost importance. In William Handel's Californian law practice, screening of potential surrogates and childless couples is performed by a qualified psychologist, Hilary Hanafin. She rejects approximately 80% of surrogates and some commissioning couples as unsuitable.<sup>79</sup> This is practically unheard of in other programmes. Handel's practice has been extremely successful so far, as his surrogates honour their agreements. This can be attributed partially to the fact that screening plays such an important role in the programme.

If surrogacy were to be permitted as an option for childless couples in South Africa, screening of all the parties will undoubtedly play an extremely important role. The framework of the Artificial Insemination Regulations, which already provides for extensive screening of donors and recipients, could serve as a sound basis to extend screening to all the parties to the agreement.

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79 Andrews L B 1989 Between Strangers 8.

### 7.3 DETERMINATION OF THE SUITABILITY TO ACT AS A SURROGATE MOTHER

In South Africa artificial insemination and in vitro fertilisation are procedures that are lawful provided the medical practitioners performing them operate within the framework of the Human Tissue Act<sup>80</sup> as amended and the Regulations thereunder.<sup>81</sup> In terms of the Regulations medical practitioners performing in vitro fertilisation and artificial insemination must ensure that the recipient is biologically, physically, socially and mentally suited for the artificial insemination.<sup>82</sup>

Donor and recipient files must be kept containing information on the family history with reference to possible genetic or mental disorders<sup>83</sup> as well as an evaluation of psychological suitability.<sup>84</sup>

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80 65 of 1983.

81 No R 1182 GG 20-06-1986 No 10283.

82 Reg 9(e)(ii). See also the discussion in chapter 6 under Criminal Liability in Terms of the Human Tissue Act and Regulations.

83 Reg 6(1)(a)(iii) and 6(1)(b) with regard to the donor and Reg 10(1)(a)(ii) and (iii) with regard to the recipient.

84 Reg 6(1)(c) with regard to the donor and Reg 9(e)(ii) with regard to the recipient.

It is submitted that in most instances physical suitability can more easily be determined than psychological or mental suitability. Important physical considerations regarding the surrogate are, amongst other things, age, weight, general physical health and medical history. Factors which should be considered with regard to the intended parents are age, medical history and the stability of their marriage. Each infertility clinic normally has its own guidelines or relies on those formulated by the organisations under whose authority it functions.

Who, if any, should be precluded from acting as a surrogate mother on the basis psychological factors such as emotional instability and how should this be determined?

Infertility specialists and other medical practitioners involved in infertility treatment are increasingly faced with these and other very important questions. Determining psychological suitability is a complex matter and a leading American psychiatrist in this field concedes that "(w)e really do not know enough about what makes a woman a good surrogate to begin screening women out", adding that the role of the professional is not to screen people out but to help people to screen themselves out.<sup>85</sup> An adequate

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85 Parker 1982 Int'l J L & Psychiatry 341; Parker 1984 Bull Am Acad Psychiatry Law 23.

knowledge and understanding of the procedure is therefore an important prerequisite.

In a surrogacy agreement, the surrogate concludes the agreement with the understanding that it is expected of her to relinquish the child to the commissioning couple after birth. The contract normally also contains an undertaking by her that she will not form or intend to form a bond with the child and will hand it over to the commissioning couple after birth. The surrender of the child is probably the most complex and controversial aspect of the procedure and has to date been the cause of most of the legal battles on the issue of surrogacy. Parker's survey in the United States of America<sup>86</sup> revealed that most surrogate mothers had given birth before<sup>87</sup> and therefore presumably understood the implications of pregnancy and birth. Yet, it seems impossible to predict with absolute certainty how the surrogate mother will react once the child is born. The argument raised - especially by feminist groups - is that it is impossible for a surrogate mother to give truly informed consent, because a woman, even if she has had children

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86 See discussion *supra*.

87 Of the 125 women interviewed 114 (91%) had had at least one previous pregnancy and 101 (81%) had had at least one live birth.



before, cannot predict her feelings towards a specific child once it has been born.<sup>88</sup>

According to Slovenko<sup>89</sup> there seems to be no empirical basis upon which to adopt a categorical approach to the eligibility of women to serve as surrogate mothers, except that minors should be excluded because of the surgical risks involved and concerns about the genuineness of their consent.

Since the much publicised Baby M<sup>90</sup> (Stern/Whitehead) case in New Jersey, USA, several states have proposed surrogate motherhood legislation.<sup>91</sup> The issue of screening of the

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88 Macklin R "Is There Anything Wrong With Surrogate Motherhood?" in 1990 Surrogate Motherhood Gostin (ed) 142; Andrews L "Surrogate Motherhood - The Challenge for Feminists" 1990 Surrogate Motherhood Gostin (ed) 172.

89 1986 J Psychiatry & L 503. This is also the view of Parker 1982 Intl J L & Psychiatry 341.

90 The Baby M case has evoked a flood of legal literature. See "Colloquy: In Re Baby M 1988 Geo L J 1719 - 1837; 1987 N Y L J 305 - 332, 653 - 665 and 997 - 1015; Moss C D "News: Surrogate Parent Debate" 1987 ABAJ 24 - 25; Moss C D "Surrogate Contract Ok'd" 1987 ABAJ 32; "At Issue: Surrogate Parenthood" 1987 ABAJ 38 - 39; Rust M "Whose Baby is It? Surrogate Motherhood After Baby M" 1987 ABAJ 52 - 56; Bacin J F "A Matter for Solomon: Rights and Obligations of Surrogate Mothers After Baby M" 1987 W St U L Rev 297 -317.

91 See the discussion *infra*. For a discussion on the proposed legislation in general see Andrews L "The Aftermath of Baby M: Proposed State Laws on Surrogate  
(Footnote Continued)

participants to a surrogacy agreement has, however, been addressed only marginally in some of the proposed surrogacy bills. Some bills, however, contain a detailed description of the surrogate's qualifications, generally focussing on psychological and medical requirements.<sup>92</sup> In some of the bills the surrogate, and in some instances also her husband, if she is married, is required to undergo counselling by a mental health professional about the psychological consequences of the termination of parental rights.<sup>93</sup> Some require a statement from the professional that all parties are capable of consenting and that they have received appropriate counselling.<sup>94</sup> In some states<sup>95</sup> psychological assessments is at the discretion of a judge, while one bill<sup>96</sup> requires a stipulation in the contract that the surrogate will be required to submit to such evaluation, and if necessary counselling, should this be requested by the

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(Footnote Continued)

Motherhood" 1987 Hastings Center Rept 31 - 40; Donovan P "New Reproductive Technologies: Some Legal Dilemmas" 1986 Fam Planning Persp 57 - 61; Katz A "Surrogate Motherhood and the Baby Selling Laws" 1986 Colum J L & Soc Probs 41 - 53.

92 Andrews 1987 Hastings Center Rept 35.

93 District of Columbia, Michigan and Illinois as discussed by Andrews 1987 Hastings Center Rept 36 and Donovan P 1986 Fam Planning Persp 59.

94 District of Columbia.

95 Massachusetts, New York and Pennsylvania.

96 Maryland.

biological father and his spouse. A proposed Californian bill requires psychological counselling for all the parties involved 30 days prior to entering into the contract and ending no earlier than two months after the birth of the child.<sup>97</sup> Several bills, in an attempt to foster an informed decision, require the parties to review the results of medical genetic and psychiatric or psychological examinations of the surrogate to decide if she is acceptable.<sup>98</sup> Several of the proposed bills forbid unmarried women to enter into surrogacy arrangements.<sup>99</sup> This is considered discriminatory and unconstitutional by those writers<sup>100</sup> who campaign for unlimited procreational freedom. In several of the proposed bills surrogacy may only be used for medical reasons, such as infertility or a threat to the health or life of the intended mother or her child were she to conceive, or the fear of transmitting genetic diseases to the child.<sup>101</sup>

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97 Andrews 1987 Hastings Center Rept 36.

98 California, District of Columbia, Illinois, Michigan and Missouri.

99 Florida, Illinois, New Jersey and South Carolina.

100 Kritchevsky B "The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family" 1981 Harvard Women's L J 41 - 42. Anon "Reproductive Technology and the Procreation Rights of the Unmarried" 1985 Harvard L Rev 685.

101 California, District of Columbia, Illinois, Massachusetts, Michigan, New York Pennsylvania and New Jersey.

In South Africa, although no direct regulation of surrogacy exists at present, it is a prerequisite in terms of the Human Tissue Act Regulations on Artificial Insemination that artificial insemination and in vitro fertilisation only be performed on a married woman with her husband's consent.<sup>102</sup>

Section 19 of the Human Tissue Act 65 of 1983 stipulates that gametes withdrawn from a living person, may be used only for "medical" purposes.<sup>103</sup> Schutte<sup>104</sup> interprets this section as precluding a single, unmarried woman from utilising artificial insemination or in vitro fertilisation in the absence of a clear medical indication. For the same reasons, he also suggests that a fertile couple, who request the procedure and embryo transfer to a surrogate mother for convenience or to enable the female partner to pursue a professional career, for instance, a ballerina, are also

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102 Reg 8. See the discussion in chapter 6 under Informed Consent. See Schutte 1986 *Hervorming* 82 n 82 who supports the idea that artificial insemination be made available only to married women, but suggests that it should be part of the Human Tissue Act and not the Regulations as this prerequisite is a matter of policy, decided by Parliament as supreme legislative authority.

103 For non-compliance with the Act, a doctor performing artificial insemination or in vitro fertilisation may face criminal sanctions in terms of s 34 of the Human Tissue Act and reg 14 of the Regulations. This aspect is discussed under Liability of Third Parties in chapter 6.

104 1986 *Hervorming* 75 - 76.

precluded, as is a widow who requests posthumous artificial insemination with her husband's (frozen) sperm after his death.<sup>105</sup> It is submitted that artificial insemination and in vitro fertilisation should only be performed if there is a clear medical indication. This should, however, not be interpreted to exclude third parties from the benefit of this procedure. A surrogate mother, who is healthy but consents to undergo artificial or in vitro fertilisation for the benefit of the intended parents should be permitted to do so.<sup>106</sup>

Our courts have not had the opportunity of examining the precise meaning of the words "medical purposes" in s 19 of

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105 As happened in France in 1984, when a young couple fell in love only to find out shortly afterwards that the male partner had cancer of the testicles and had to undergo chemotherapy treatment, which could result in sterility. He deposited sperm in a bank for later use by his wife, whom he married a few days before his death. Her request for the sperm from the sperm bank was refused by the bank on the ground that sperm should not be considered an object returnable under a normal deposit arrangement. The district court denied Mrs P's claim as her husband had not specifically mentioned the sperm in his will. This decision was, however, later overruled by a suburban court in Creteil on 1.8.1984 (4225/84), which granted her the right to obtain the sperm. For a discussion see Deutsch E "Parpalaix et al v C E C O S: Right of the Widow of a Sperm Donor to have the Sperm of Her Late Husband Handed Over to Her" 1985 Med Law 299 and 1985 Versicherungswirtschaft 700; also discussed in "Current Topics" 1984 Austl L J 627. See also the discussion in chapter 6 under Proprietary Rights to Gametes/Embryos.

106 See the Recommendations in chapter 7.

the Human Tissue Act. The Act itself also fails to define the meaning clearly. If a narrow interpretation is accorded to this section, a bereaved widow who suffers from severe emotional stress or depression, may not, in the absence of a physical disability, be inseminated with (frozen) sperm from her deceased husband, even where clear instructions to this effect were stipulated in a will and she desperately wishes to do so. Even though she will, strictly speaking not qualify as she is no longer a "married woman" in terms of the Artificial Insemination Regulations, it is submitted that her position in our law is unsatisfactory at present. Although posthumous artificial insemination is not to be encouraged because of the adverse effects it may have in the fields of inheritance and succession,<sup>107</sup> it is submitted that a more equitable result could be obtained if the practice is restricted to cases where the deceased expressed his wish for the release of the frozen genetic material in a valid will and only within a limited time after the death of the spouse.

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107 See 1987 Ethical Considerations in Medical Research of the SAMRC 28 where it is suggested that the long-term freezing of gametes is not recommended - at least not for longer than the expected reproductive life of the donors. See also the Warnock Report par 10.9.

#### 7.4 RECOMMENDATIONS ON SCREENING

It is submitted that all the parties to a surrogacy agreement be carefully evaluated and screened for biological, physical, social and mental suitability, similar to screening of the parties in adoption proceedings.<sup>108</sup> For the benefit of the child, it is essential that the stability of the commissioning couple's relationship be determined prior to the insemination to ensure that they can fulfil the physical and emotional needs of the child.

It is submitted that surrogacy should only be utilised as a final option for those couples for whom no other alternative exists and only in the presence of a clear medical indication.

#### 8 A COMPARATIVE ANALYSIS OF SURROGATE MOTHERHOOD IN CERTAIN FOREIGN JURISDICTIONS

In recent years there has been renewed interest in the subject of artificial conception and related matters such as embryo freezing, research and human genetics. This interest has not been restricted to those directly involved such as

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108 It is, however submitted that surrogacy, although analogous to adoption, is different in the sense that one of the intended parents is usually also the genetic parent of the child. See in general Atwell B L "Surrogacy and Adoption: A Case of Incompatibility" 1988 Colum Hum Rts L Rev 15 - 16.

medical practitioners, lawyers and law and policy makers, but has spread to women's organisations,<sup>109</sup> church groups, governmental and related committees and many other groups. The media have played a major role in the process - especially in influencing public opinion. Examples are numerous, but the sensational media coverage of the Baby Cotton case in Britain and the Baby M case in America<sup>110</sup> and even of our own Ferreira-Jorge triplets provide adequate proof.

In several countries commissions have been appointed and work groups set up to study the various aspects of artificial conception and related research. It is impracticable for the purposes of this thesis to consider all the results and recommendations. For the purpose of this thesis, some of the major reports in the field of artificial insemination and related matters have been selected for an evaluation. Guidelines and recommendations by some of the most important medical institutions, especially in the United Kingdom and the United States of America, are also

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109 Some feminists, for instance, oppose the practice of surrogate motherhood on the grounds that a woman is merely used as a "breeder". See in general Corea G 1986 *The Mother Machine* 213 - 249; Ince S "Inside the Surrogate Industry" in 1984 *Test Tube Women: What Future for Motherhood?* Arditti R and Klein R D (eds) 99 - 116.

110 See discussion *infra* under Court Cases.



incorporated into the discussion as medical practitioners and infertility specialists have, to a large extent, relied on these in the absence of direct legislation. The South African situation is discussed separately in chapter 7.

## 8.1 THE UNITED KINGDOM

### 8.1.1 THE WARNOCK REPORT

In the United Kingdom artificial conception and related matters have been considered by numerous study groups and committees.<sup>111</sup> The most important is the Department of Health and Social Security's report on the Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock known as the Warnock Report.<sup>112</sup>

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111 Department of Health and Social Security; Scottish Home and Health Department and Welsh Office; the British Medical Association; Board of Science and Education, Panel on Human Artificial Insemination; British Medical Association, Working Group on In Vitro Fertilisation; Medical Research Council; Royal College of Obstetricians and Gynaecologists, Ethics Committee on In Vitro Fertilisation and Embryo Replacement or Transfer; the Law Commission; the Law Society Standing Committee of Family Law, Human Fertilisation and Embryology; the Law Society of Scotland and the Department of Health and Social Security Committee of Inquiry into Human Fertilisation and Embryology.

112 Cmnd 9314 (1984). The Warnock Committee consisted of sixteen appointed members under the leadership of Dame Mary Warnock. Its terms of reference were "to consider recent and potential developments in medicine and science relating to human fertilisation and embryology;  
(Footnote Continued)

The majority view regarding assisted reproduction expressed in the report is that AIH<sup>113</sup> is an acceptable form of treatment which need not be formally regulated.<sup>114</sup> AID<sup>115</sup> was considered in more detail and recommendations put forward that the procedure be regulated and performed under licence.<sup>116</sup> It was also recommended that the resulting child should be the legitimate child of the mother and her husband if they both consented to the procedure.<sup>117</sup> The Commission also recommended that on reaching the age of eighteen, the child should have access to some basic information regarding the ethnic origin and genetic health of the donor.<sup>118</sup> They further recommended that no parental rights or duties should

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(Footnote Continued)

to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations". For a discussion of the findings and recommendations of the Warnock Report in general see Craig N F "The Warnock report: A Precipitate of the Council's Observations" 1985 J L Soc Scotland 136 - 139; Walsh E "Warnock and After" 1985 Fam Law 138 - 139.

113 Artificial insemination of the wife with sperm from her husband.

114 At par 4.4 and 4.5 of the report.

115 Artificial insemination with sperm from a donor.

116 At par 4.16 of the report and with regard to licensing, par 13.7 of the report.

117 At par 4.17 of the report.

118 At par 4.21 of the report.

vest in sperm donors<sup>119</sup> and that there should be a gradual move to compensate donors for (necessary) expenses.<sup>120</sup> The Warnock Commission was also supportive of in vitro fertilisation, provided it is regulated and performed under an approved licence.<sup>121</sup>

Ova donation was also considered an acceptable procedure in infertility treatment.<sup>122</sup> Analagous to sperm donation and in vitro fertilisation, it was recommended that it should be carefully regulated and subjected to licensing and other controls.<sup>123</sup> According to the Commission, embryo donation, where semen and ova from donors are fertilised in vitro and the embryo transferred to a woman who would otherwise be unable to have a child, was also acceptable, subject to the same licensing and regulation recommended for AID, IVF and ova donation.<sup>124</sup>

Chapter 8 of the Warnock report deals with surrogacy and in their recommendations, the investigators acknowledge that

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119 At par 4.22 of the report.

120 At par 4.26 of the report.

121 At par 5.10 of the report.

122 At par 6.6 of the report.

123 At par 6.6 of the report.

124 At par 7.4. of the report.

the question of surrogacy presented them with some of the most difficult problems encountered.<sup>125</sup> Although the Committee did not regard surrogacy practices as such unlawful<sup>126</sup> it nevertheless recommended that "legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancies or making arrangements for individuals or couples who wish to utilise the services of a carrying mother".<sup>127</sup> This recommendation was incorporated into s 2 of the Surrogacy Arrangements Act 1985, which attempts to prevent third parties, especially commercial surrogacy agencies, from deriving financial benefit from surrogacy agreements.<sup>128</sup> This is also a deterrent to any professional involvement in surrogacy.

The Commission rejected criminal liability for the parties to a surrogacy agreement (surrogate mother and commissioning

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125 At par 8.17 of the report.

126 At par 8.4 of the report.

127 At par 8.18 of the report.

128 In terms of s 2 of the Act any person who acts on behalf of a body of persons or who takes part in negotiating or facilitating the making of a surrogacy arrangement in the United Kindom and who receives payment for such services is guilty of an offence and can face a fine or imprisonment of up to three months (s 4). In terms of s 4(2)(a) the consent of the Director of Public Prosecutions is essential for any prosecution.

parents) for fear of tainting the child with the parents' criminality.<sup>129</sup> As private agreements may still be concluded, the Commission recommended that it be provided by statute that all surrogacy agreements are illegal contracts and therefore unenforceable in the courts.<sup>130</sup>

The Warnock Commission also recommended<sup>131</sup> that should an oocyte or embryo be donated, the gestational mother and her husband should be the legal parents of the child and the rights and obligations of donors should be terminated. If legislation to this effect is adopted, the Commission recommended that it should be wide enough to cover gestational surrogacy.<sup>132</sup> Should a child, however, prefer to live with its genetic rather than its gestational mother, the adoption laws should be made more flexible to allow for the adoption of the child by its genetic mother.<sup>133</sup>

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129 At par 8.19 of the report.

130 At par 8.19 of the report.

131 At par 6.8 and 7.6 of the report.

132 S 27 of the Family Law Reform Act 1987 now provides that the woman giving birth and her husband are the legal parents of the child if the child was conceived by artificial insemination with donor semen, provided that the husband consented to the insemination. No mention is made of donated oocytes or embryos.

133 At par 8.20 of the report.

## 8.1.2 STATEMENTS BY MEDICAL SOCIETIES/ASSOCIATIONS IN THE UNITED KINGDOM

### 8.1.2.1 BRITISH MEDICAL ASSOCIATION (BMA) WORKING GROUP ON IN VITRO FERTILISATION

This working group was established in 1982 and published an interim report in 1983.<sup>134</sup> The issue of surrogate motherhood was only touched on briefly and doubts were expressed as to whether the procedure would ever be acceptable.<sup>135</sup> No reasons were given for this statement. This viewpoint was later reiterated in the 1983 - 1984 Annual report of the Council where it was stated that the Council considered it unethical for a doctor to become involved in techniques and procedures leading to surrogate motherhood.<sup>136</sup>

In 1987 it was reported that the British Medical Association Council had again objected to surrogate motherhood.<sup>137</sup> Objections raised were potential psychological damage to the child, commercial exploitation and utilisation of the procedure for mere convenience in the absence of a clear

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134 British Medical Association working group on In Vitro Fertilisation Appendix vi: Interim Report on Human In Vitro Fertilisation and Embryo Replacement and Transfer 1983 British M J 1594, discussed in the 1985 Ontario Law Reform Commission Report vol II 315.

135 1594.

136 British Medical Association Annual Report 25 discussed in the Ontario Law Reform Commission Report 317.

137 "Doctors Against Surrogacy" 1987 Fam Law 372.

medical indication. However, at the actual general meeting in July 1987, the anti-surrogacy lobby was narrowly defeated and a more liberal approach adopted.<sup>138</sup>

During 1990 the BMA published an extensive and much more liberal Surrogacy Report,<sup>139</sup> including guidelines<sup>140</sup> to medical practitioners in the handling of surrogacy cases. Unlike the previous reports, medical practitioners are advised that they may assist infertile couples who want to have a child by a surrogate mother. The guidelines are only applicable where a medical practitioner is consulted for assistance during a surrogate pregnancy. The working party warned medical practitioners to work within the framework of the Surrogacy Arrangements Act 1985.<sup>141</sup>

In the guidelines, medical practitioners are alerted to the unenforceability of surrogacy agreements as one of the many risks of the procedure. It is suggested that surrogacy should be considered only as a final resort in infertility

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138 Ibid.

139 Published in the 1990 Pract Child L Bull 105 - 107.

140 The guidelines were drawn up by a working party chaired by Sir Malcolm MacNaughton of the University of Glasgow and are set out in the BMA Annual report of the Council for 1989 - 1990 and was approved by the Annual Conference of the BMA on 26 June 1990.

141 See the discussion of the Act *infra*.

treatment and it is reiterated by the Council that it would be unethical to utilise the procedure for mere convenience, in the absence of a clear medical indication.

The general risks involved in surrogacy arrangements are delineated, especially the effect it may have on the members of the respective households and existing children as well as children yet to be born. Medical practitioners are advised that only women who have partners and who have already had one or more children should be considered as potential surrogates. The Council considered it advisable that the parties be unaware of each other's identity. Proper counselling and screening are advised. Medical practitioners should ensure that the parties are fully aware of the kind and degree of all the risks associated with such an arrangement. Two categories of risks are distinguished, namely those generally associated with pregnancy and those which are specifically related to surrogacy. Details of the latter are provided in the guidelines and cover a wide field ranging from legal implications resulting from non-compliance with the agreement to psychological and social risks and even a warning that the media may get hold of the story and harass the parties - including the child. The BMA expressed the opinion that it would be unethical for medical practitioners to initiate the process, if they are not entirely satisfied that the parties understand all the



risks and implications of the procedure and have voluntarily accepted and consented to it.

It is also recommended that a lawyer be consulted prior to the initiation of the process - specifically to assist the intended parents during adoption proceedings.<sup>142</sup>

#### 8.1.2.1.1 EVALUATION OF THE BMA REPORT

The 1989 - 1990 BMA Surrogacy Report provides a lucid illustration of the continuing progress in the field of assisted reproductive technology. Whereas surrogacy was once viewed with scepticism and extreme caution, it has now become a real option for childless couples in Britain. Medical practitioners admittedly still carry a serious responsibility to ensure that the right decisions are reached, but for those who are in favour of the procedure, the doors are now open.

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142 During the discussion of the Human Fertilisation and Embryology Bill before Parliament, it was suggested that an additional clause be included to provide an alternative to adoption in cases of full surrogacy. The procedure bears a resemblance to adoption, but is less complicated. See the discussion of the Bill infra.

8.1.2.2 ROYAL COLLEGE FOR OBSTETRICIANS AND GYNAECOLOGISTS  
(RCOG) ETHICS COMMITTEE REPORT

In March 1983 the Ethics Committee on In Vitro Fertilisation and Embryo Replacement or Transfer of the Royal College for Obstetricians and Gynaecologists published its report.

Paragraph 7 of the report deals with the issues surrounding surrogate motherhood. Medical indications for surrogate motherhood are recognised in the case of a "bad producer" (sic).<sup>143</sup> The Committee is, however, opposed to the practice as "it carries important legal and psychological difficulties, especially in relation to the child". Other objections are: the stress which relinquishing the child may cause for the surrogate, and the results of non-compliance with the contract for the commissioning couple.<sup>144</sup> The Committee draws attention to the inability of the surrogate mother to predict whether she will be able to relinquish the child at birth. It is also stated that an agreement to give up a child is not an enforceable legal contract. The legal mother, according to the Committee, is the "person from whose body the child emerges". However, should the surrogate relinquish the child so that it may be adopted by the

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143 At par 7.1 of the report.

144 At par 7.3 of the report.

commissioning couple, such an action is not per se illegal, provided statutory requirements are met.

#### 8.1.2.3 COUNCIL FOR SCIENCE AND SOCIETY<sup>145</sup>

A report published by the working party of the Council for Science and Society entitled **Human Procreation: Ethical Aspects of the New Techniques** contains interesting information based on thorough research. S 7.3.12 deals with surrogate motherhood to which approximately five pages are devoted. Commercial surrogacy, as practised in some American states is examined and it is concluded that the enforceability of commercial surrogacy contracts in the United Kingdom is doubtful and not recommended as parental rights may not be transferred without interference from the courts in terms of s 85(2) of the Children Act 1975. The payment of money for adoption also constitutes a criminal offence in terms of s 57 of the Adoption Act 1976. There is, however, nothing which prohibits a father of an illegitimate child from approaching the court with an application for

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145 This Council is a registered charity with the object of "promoting the study of, and research into, the social effects of science and technology, and of disseminating the results thereof to the public". Major studies are conducted by ad hoc working parties, composed of experts in the respective fields together with lawyers and philosophers. The prime task is seen as one of stimulating informed public discussion in the field of "the social responsibility of the scientist".

legal custody of the child as provided by s 9(1) of the Guardianship of Minors Act 1971 in which case the outcome would be determined by what would be regarded as being in the best interest of the child.

The working party concluded that it is undesirable to impose criminal sanctions as such offences may be difficult to prove and it "may operate harshly on those who do not deserve to be branded as criminals when they are seeking to satisfy deeply felt needs in what they see as a responsible way".<sup>146</sup> The working party recommended that criminal sanctions be employed against groups attempting to develop these practices for commercial gain, but observed that this may have the negative effect of driving people into less formal and unsatisfactory arrangements over which there is no control.<sup>147</sup> They therefore recommended that such contracts be made unenforceable unless social attitudes change.<sup>148</sup> An unsatisfied party is still free to apply to the court for custody. The court in awarding custody, will consider the welfare of the child as paramount consideration.

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146 At par 7.3.24.

147 At par 7.3.24.

148 At par 8.7.

It is concluded that surrogate motherhood should not be encouraged, but doubts were expressed as to whether it should be legally prohibited.<sup>149</sup>

## 8.2 UNITED STATES OF AMERICA

### 8.2.1 STUDY COMMISSIONS

Although several states have appointed commissions to consider the viability of surrogacy, as far as could be ascertained only one state has released a comprehensive report on the procedure. In May 1988 the New York State Task Force on Life and the Law released a report, *Surrogate Parenting: Analysis and Recommendations for Public Policy*.

#### 8.2.1.1 RECOMMENDATIONS OF THE N Y STATE TASK FORCE

The Task Force was chaired by the Commissioner of Health in the State of New York. Task Force members included medical practitioners, lawyers, members of the nursing profession, academics, representatives of numerous religious groups, philosophers and psychologists.

Despite the diversity of its members, the Task Force concluded unanimously that public policy should discourage

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<sup>149</sup> At par 8.7(g)

surrogate parenting.<sup>150</sup> It was pointed out that children are placed at risk and that the practice is not in their best interest, neither is it in the interest of society at large. It has the potential of undermining the dignity of women, children and human reproduction by commercialising childbearing.

The report contains recommendations on many issues and includes a legislative proposal on how the proposed goal should be achieved.

Under existing legislation in the state of New York, there are no barriers to non-commercial, surrogacy arrangements. It was recommended that the community should not interfere with voluntary choices by adults and such arrangements were not condemned.<sup>151</sup> It was specifically stated in the report that proposed legislation would greatly reduce the practice of surrogacy, but would not eliminate it. The proposed bill would not override existing statutes in the state under which artificial insemination, embryo transfer, adoption and the payment of reasonable expenses to women arising from

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150 At 125 of the report.

151 At 126 of the report.

pregnancy are permitted even when such expenses are paid as part of an adoption.<sup>152</sup>

The Task Force evaluated and rejected upholding the contract under regulatory models proposed in some states on the grounds that the practice should be discouraged rather than being accepted. Assistance should, accordingly be provided by the legislature and the courts.<sup>153</sup> It recommended that legislation be enacted declaring the contract void as against public policy and prohibiting the payment of fees (over and above reasonable expenses) to surrogates.<sup>154</sup> Surrogacy brokers should also be prohibited from operating in the state.<sup>155</sup>

The members of the Task Force expressed their sympathy with infertile couples, but felt that initiatives should be taken to prevent infertility rather than to support surrogacy.<sup>156</sup>

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152 At 126 of the report.

153 At 126 of the report.

154 At 125 of the report.

155 At 127 of the report.

156 At 127 of the report.

#### 8.2.1.1.1 EVALUATION OF THE RECOMMENDATIONS OF THE N Y STATE TASK FORCE

Considering the experience with commercial surrogacy in the United States of America, and specifically the much publicised Baby M<sup>157</sup> case in New Jersey, it is not surprising that the Task Force expressed itself strongly against commercial surrogacy. Barring surrogacy agents from operating in the state, also comes as no surprise as that is an effective way of restricting commercial surrogacy and preventing third parties from making large profits.

The recognition of and recommendation that non-commercial surrogacy should not be prohibited, is also to be welcomed as it serves no purpose to punish adults for voluntary, non-coerced procreative choices which pose no harm to society.

#### 8.2.2 POLICY STATEMENTS

Policy statements on surrogacy have also been published by the American Civil Liberties Union (ACLU) and the Institute of Women and Technology. The ACLU specifically addresses the constitutional rights of all the parties to the agreement as well as those of the surrogate child. The policy statement

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157 See the discussion under case law in the USA *infra*.



by the Institute of Women and Technology on the other hand, focuses primarily on sex discrimination and the possible "social and political exploitation of women". They favour federal legislation prohibiting contractual surrogacy arrangements rather than regulating the procedure.

Important statements and guidelines, which merit discussion, have also emerged in the medical field.

### 8.2.3 MEDICAL GUIDELINES

#### 8.2.3.1 THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS (ACOG)<sup>158</sup>

A policy statement and guidelines were issued in May 1983 under the title *Ethical Issues in Surrogate Motherhood*<sup>159</sup>. The College expressed "significant reservations" about the procedure of surrogate motherhood.

Risk factors were pointed out, such as the possibility of psychological stress on the parties involved, on the

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158 Published as *Ethical Issues in Surrogate Motherhood* ACOG Statement of Policy 56 Washington, D C - American College of Obstetricians and Gynecologists (1983).

159 Discussed in 1983 *The Hastings Center Rept* 31; Ontario Law Reform Commission Report on Human Artificial Reproduction and Related Matters Vol II 370 and *Surrogate Motherhood* Gostin (ed) 300 - 303.

marriage and possibly also on the resulting children.

Specific difficulties such as anonymity of the parties and legal status of the children were touched upon. The College expressed deep concern about the commercialisation of the procedure and pointed out the difficulty of differentiating between the payment for a service and payment for the child. Commercialisation may, according to the College, also open the door to exploitation of the parties involved.

The view of the College is that the decision to participate in surrogacy arrangements should be left to the individual practitioner.<sup>160</sup> Medical practitioners are, however, cautioned that they should carefully weigh the ethical, legal, psychological, societal and medical factors involved in reaching their decision. Guidelines<sup>161</sup> were suggested for medical practitioners who participate in surrogacy agreements. In the first place there should be a full discussion of ethical and medical risks, benefits and alternatives. Medical practitioners are under no obligation to take part in surrogacy, but if they decide to do so, they should follow the following procedures:

- 1 the parties should be properly screened (for instance

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160 See also Slovenko 1985 J Psychiatry & L 494 and Hirsh H L "Surrogate Motherhood: the Legal Climate for the Physician" 1986 Med Law 165.

161 See 1983 Hastings Center Rept 31; Surrogate Motherhood Gostin (ed) 302.

- infertility studies and genetic screening);
- 2 medical practitioners should receive only the usual compensation for their services;
  - 3 medical practitioners should not participate in an agreement where the financial arrangements are likely to exploit any of the parties.

#### 8.2.3.2 THE AMERICAN MEDICAL ASSOCIATION (JUDICIAL COUNCIL)

In a report, the Judicial Council of the American Medical Association warned physicians<sup>162</sup> that they may place themselves in legal and ethical jeopardy by participating in surrogacy arrangements. Some legal, ethical and psychological risks were pointed out by the Council, and on the strength of the report the American Medical Association opposed surrogacy.

Specific concerns were raised about the possibility of the birth of a defective child, which would be rejected by both the surrogate mother and the intended parents. Other concerns raised were refusal by the surrogate to give up the child and the possibility of the surrogate obtaining an abortion.

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162 "Surrogate Motherhood Opposed" 1984 American Medical News 3 quoted by Hirsh L 1986 Med Law 154 and 167 n 44; 1990 Surrogate Motherhood Gostin (ed) 304 - 306.

A Council spokesman emphasised that the report did not declare surrogacy per se unethical.<sup>163</sup> Medical practitioners may still perform the usual services required in caring for a pregnant surrogate mother. It suggested, however, that alternative procreation methods are preferable, for instance the utilisation of sperm or ova donors and artificial insemination and adoption, where possible.

#### 8.2.3.3 THE AMERICAN FERTILITY SOCIETY (AFS)

In 1980 the Board of Directors of the Society, approved guidelines on artificial insemination in their report entitled: Report of the Ad Hoc Committee on Artificial Insemination

In 1986 the Ethics Committee<sup>164</sup> of the AFS published Ethical Considerations of the New Reproductive Technologies.<sup>165</sup> In 1987 the Congregation for the Doctrine of the Faith issued a report with the title Instruction on the Respect for Human

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163 Hirsh 1986 Med Law 165 with reference to the 1984 American Medical News.

164 Members of the Committee consisted of lawyers, medical practitioners, biologists, a moral theologian and ethicists.

165 September 1986 Fertility and Sterility Supplement 1 46:3

Life in its Origin and on the Dignity of Procreation<sup>166</sup>, which conflicted with the report by the Ethics Committee on a number of issues. In reply the American Fertility Society was convened and subsequently published another report in February 1987.<sup>167</sup> The document deals with issues such as homologous artificial insemination<sup>168</sup> and in vitro fertilisation, the use of heterologous gametes,<sup>169</sup> biomedical research and respect for the pre-embryo, the role of the law in regulating reproductive technologies, and a summary and conclusions. Surrogacy as such received scant attention apart from a condemnation of the view expressed in the Instruction that the utilisation of all forms of assisted reproductive technology should be made a punishable offence. The views expressed in the 1986 report were reiterated.

The 1986 report which contains detailed information on the results of, and thorough research into the subject of new reproductive technology, warrants a more detailed discussion. The issue of surrogacy is dealt with

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166 Also referred to as the Vatican's Instruction of Respect for Human Life.

167 Ethical Considerations of the New Reproductive Technologies 1986 - 1987.

168 Artificial insemination without utilising donors.

169 Utilising donor sperm and ova.

comprehensively and evaluated on a cautious yet rational basis. The focus is on the potential effects of surrogacy on the surrogate, the couple, the potential child and society in general, and each aspect is discussed separately.

In their recommendations<sup>170</sup> the Committee stated that the issue of surrogate motherhood requires intense scrutiny and the Committee expressed its dismay at the shortage of empirical evidence available regarding the process and its effects on those involved.

The Committee stated that surrogacy should only be utilised for medical reasons and not merely for convenience.

According to the Committee, it is up to the individual members of the medical profession to decide whether they want to participate in such arrangements. The Committee recognises that surrogacy offers the only solution to some forms of infertility (eg the absence of a uterus in the female, inability to produce oocytes or the fear of passing a genetic defect to children), but warns against widespread clinical applications of the procedure because of inherent legal, ethical and health concerns.

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170 On 62 S.

It is the view of the Committee that there are not adequate reasons for the recommendation that surrogate motherhood be legally prohibited. The Committee, however, expressed serious ethical reservations as to the desirability of the procedure until such time as appropriate data are available for a reasonable assessment of the risks and possible benefits of the procedure. The Committee suggested that thorough research (in the form of a clinical experiment) be undertaken if surrogate motherhood is pursued. Suggested issues for research include:

- (a) psychological effects of the procedure on the surrogates, the couples and the resulting children;
- (b) the effects, if any, of bonding between the surrogate and the fetus in utero;
- (c) the appropriate screening of the surrogate and the sperm donor;
- (d) the likelihood that the surrogate will exercise appropriate care during the pregnancy;
- (e) the effects of having the couple and the surrogate meet one another;
- (f) the effects on the surrogate's own family of her

participation in the process;

- (g) the effects of disclosing or not disclosing the use of a surrogate mother or her identity to the child and
- (h) other issues that shed light on the effects of surrogacy on the welfare of the various persons involved and on society.

Special attention should also be accorded the issue of voluntary and informed consent, screening for infectious diseases of the surrogate and genetic father, and genetic screening of the surrogate.

On the complex issue of compensation the Committee suggested the following:

- (a) professionals involved should receive only their customary fees (to avoid potential conflicts of interest or exploitation) and
- (b) it is preferable that compensation of the surrogate be limited to necessary expenses and compensation for inconvenience.

Finally, the Committee suggested that should surrogacy prove to be a viable option, the law should be amended to provide



that the commissioning couple be regarded as the legal parents.<sup>171</sup>

#### 8.2.3.3.1 EVALUATION OF THE REPORT OF THE AFS

The report by the Ethics Committee of the American Fertility Society is comprehensive and practical and could serve as a suitable basis for medical practitioners utilising assisted reproductive technology.<sup>172</sup>

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171 One the eleven members of the Committee dissented, expressing the view that the risks outweigh the benefits taking into consideration the small number of couples who qualify as candidates. For this reason he believed that in-depth research is unlikely.

172 The author was informed by prominent infertility specialists that there are indeed a number of practitioners in South Africa who rely on the guidelines provided in this report.

### 8.3 AUSTRALIA

Several Australian states<sup>173</sup> and governmental bodies<sup>174</sup> have published reports on artificial conception and related matters.<sup>175</sup>

With one exception, the Australian reports are opposed to the practice of surrogate motherhood in general. The most

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173 E g Victoria The Committee to Consider the Social Ethical and Legal Issues Arising from In Vitro Fertilization -Interim report Melbourne (1982), Report on Donor Gametes in In Vitro Fertilisation Melbourne (1983); Surrogate Mothering, Melbourne (1984); Report on the Disposition of Embryos Produced by In Vitro Fertilization Melbourne (1984). South Australia - Report of the Working Party on In Vitro Fertilisation and Artificial Insemination by Donor Adelaide (1984); In Vitro Fertilization and Artificial Insemination by Donor - Proceedings of the South Australia Health Commission. Queensland Report of the Special Committee appointed by the Queensland Government to Inquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters Brisbane (1984). Tasmania - Committee to Investigate Artificial Conception and Related Matters: Final report Hobart June (1985) and reports in Western Australia - Committee to Enquire into the Social, Legal and Ethical Issues relating to In Vitro Fertilization and its Supervision: final report (1986). New South Wales - New South Wales Law Reform Commission Report: Human Artificial Insemination Sydney (1986).

174 For instance the National Health and Medical Research Council (NHMRC) of the Commonwealth of Australia.

175 The Australian reports are discussed by Thomson C J H 1987 Freiburg Symposium on Criminal Law and Bio-medical Techniques (unpublished report) 5. For a comparative discussion of the Australian reports see Giesen D "Probleme Künstlicher Befruchtungsmethoden beim Menschen" 1985 Juristen Zeitung 641 - 692.

important objections were raised against commercial surrogacy and the placing of advertisements in newspapers by surrogacy agencies.<sup>176</sup>

One of the most important reports to date is the Victoria Commission of Inquiry's report. The Commission was appointed by the Victoria Government in 1982 to examine the legal, social and ethical issues resulting from in vitro fertilisation. The Commission was chaired by Professor Louis Waller, chairman of the Victoria Law Reform Commission. The report is thus referred to as the **Waller Commission Report**.<sup>177</sup> Reports were issued in 1982 (the Interim report), 1983 (Issues Paper on Donor Gametes and Report on Donor Gametes and In Vitro Fertilization) and 1984 (Report on the Disposition of Embryos Produced by In Vitro Fertilisation).

The Waller Reports firmly opposed the practice of surrogacy. Commercial surrogacy is, according to the report, totally unacceptable and surrogates should not receive compensation. They concluded that an agreement for the adoption of the surrogate child by the intended mother, amounts to a criminal conspiracy to violate the provisions of the Adoption of Children Act 1964 (Vic). It was recommended that

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176 "Current Topics" 1984 Austl L J 684.

177 See in general "Current topics" 1985 Austl L J 306.

"the Victorian criminal law be strengthened to make it clearly an offence to enter into, or contribute in any way to, a commercial surrogacy agreement".

The recommendation that participation in a surrogacy arrangement should be a punishable offence, was criticised<sup>178</sup> - and it is submitted, rightly so - because it does not solve the problems surrounding surrogacy. The status of children born from such arrangements remains uncertain and they are the ones who suffer as a result of the procreative decision of their parents. Criminal measures are also to a large extent ineffective as desperate childless couples are forced to conclude the agreement in countries where surrogacy is legal.

The abovementioned reports formed the basis of subsequent legislation in Victoria - the Infertility Medical Procedures Act of 1984 - which is discussed under legislation, below.

Another important committee, the Asche Committee of the Commonwealth Family Law Council on reproductive technology also issued a report entitled Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology

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178 "Current Topics" 1984 Austl L J 683 - 685.

in Australia.<sup>179</sup> This report was tabled in the Federal Parliament on 21 August 1985 by the Commonwealth Attorney General.<sup>180</sup> The thrust of the report is aimed at tackling the issues involved in reproductive technology on a national basis and not on a "fragmented" state by state approach.

One of the major recommendations in the report is the banning of all surrogate motherhood arrangements. This is consistent with the prohibition of surrogacy in s 30 of the Victorian Infertility Medical Procedures Act of 1984, which is discussed in greater detail under legislation.

In 1989 the National Bioethics Consultative Committee (NBCC)<sup>181</sup> issued a draft report on surrogacy<sup>182</sup> in which it

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179 Information obtained from 1986 Austl L J 6 - 7. During a conference on "Ethical Implications in the Use of Donor Sperm, Eggs and Embryos in the Treatment of Human Fertility" held at Monash University and discussed in 1983 L Institute J 716, Asche J condemned the practice of surrogacy because it poses the danger of duress and blackmail. Duress because the surrogate may only conclude the agreement for financial benefits, and blackmail because she may threaten to keep the child unless the original price agreed upon is increased.

180 The background of the Commission and some recommendations are discussed in 1986 Austl L J 6.

181 This body was established to advise Health Ministers on, amongst other things, the social, ethical and legal issues arising from reproductive technology and bio-medical and health related research; 1989 Reform (Australian Law Reform Commission) 207.

182 Discussed in 1989 Reform 206 - 209.

recommends that surrogacy arrangements should not be legislatively prohibited but rather be controlled by uniform legislation. The reason provided for the recommendation is the autonomy of the parties in making procreative decisions, provided the full and informed consent of all the parties is obtained. It was also stated that surrogacy is neither immoral nor antisocial and is utilised by a limited number of people. The Committee recommended that surrogacy arrangements should not be prohibited legislatively, but should also not be positively encouraged.

#### 8.4 CANADA

One of the most important reports on Human Artificial Reproduction and Related Matters is undoubtedly the one issued by the Ontario Law Reform Commission in two volumes in 1985. This report contains an in-depth and rational study of the subject based on thorough research.<sup>183</sup> The recommendations on surrogate motherhood alone comprises

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183 See Eaton T A "Comparative Responses to Surrogate Motherhood" 1986 Neb L Rev 686 - 727 who praises the report for addressing the issue of surrogacy sensibly, sensitively and comprehensively" and states that "it provides the basis for a legislative package that accommodates the legitimate aspirations of childless couples while addressing the fears of those concerned with exploitation and commercialization of procreation".

seventy-three pages of the report in which a detailed regulatory scheme of the whole process is proposed.

It is submitted that this report could serve as a basis for the regulation of surrogacy in South Africa for several reasons.<sup>184</sup>

- 1 There is a clear analogy between the regulatory scheme suggested by the Commission and adoption proceedings, which is a well-established procedure requiring a careful assessment of the suitability of the intended parents.<sup>185</sup>
- 2 The welfare of the child is of paramount importance.
- 3 The rules of procedure and evidence in the Canadian courts are similar to those in our courts as a result of our corresponding common law background.<sup>186</sup>
- 4 The procedure could take place in courts where the newly appointed official - the family advocate -

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184 See Lupton M L "The Right to Be Born: Surrogacy and the Legal Control of Human Fertility 1988 DJ 50 - 51; Pretorius R "A Comparative Overview and Analysis of a Proposed Surrogate Mother Agreement Model" 1987 CILSA 293.

185 As the Commission pointed out at 234, the Child Welfare Act is useful as a model, but not ideal in surrogacy arrangements.

186 Van Zyl D H 1981 *Beginnels van Regsvergelyking* 195; Hahlo H R and Kahn E 1973 *The South African Legal System and its Background* 128.

can play a major role in assisting the court during the initial application.

8.4.1 SUMMARY OF THE RECOMMENDATIONS OF THE ONTARIO  
LAW REFORM COMMISSION REPORT

The majority members of the Ontario Law Reform Commission agreed that the practice of surrogacy is not immoral and found it an ethically accepted response to the problems of infertility.<sup>187</sup> A comprehensive regulatory model was recommended, designed to legitimise and regulate the practice of surrogacy.

It was recommended that participants to a surrogacy arrangement, should first obtain the approval of the Provincial Court (Family Division) or the Unified Family Court.<sup>188</sup> The agreement should be in writing and the court should approve the terms of the agreement to ensure that they provide adequate protection for the child and the parties.<sup>189</sup> Mandatory minimum legislative standards should apply regarding:

- 1 surrender of the child;
- 2 payment to the surrogate mother;

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187 Vol II 229 - 233.

188 Vol II 285.

189 Vol II 281.



- 3 birth of a handicapped child and
- 4 abortion and the surrogate mother.

The parties are free to include terms of their choice in the agreement, but should include terms on the following issues:<sup>190</sup>

- 1 health and life insurance for the prospective surrogate mother;
- 2 arrangements for the child should any one or both of the intended parents die or cease to live together;
- 3 arrangements regarding the manner in which the child should be surrendered after birth;
- 4 the right, if any, of the surrogate mother to obtain information regarding, or to have contact with the child after birth;
- 5 regulation of the surrogate mother's activities before and after conception, including dietary obligations and
- 6 conditions under which prenatal screening of the child may be justified or required, for example, ultrasound, fetoscopy or amniocentesis.

Detailed provisions are made for assessing the suitability of the intended parents and the surrogate mother. It was

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190 Vol II 284.

suggested that children's aid societies could play a role in this assessment. Notice of application for approval of the agreement should be served upon the appropriate children's aid society, which should have locus standi during the proceedings, but may only intervene if its records disclose information demonstrating the unsuitability of either of the parties.<sup>191</sup> Prior to approval, the court should be satisfied that there is a medical need for the procedure.<sup>192</sup>

Anonymity of the parties should be maintained as well as confidentiality of the court records.<sup>193</sup> Proceedings should be heard in camera.

Review of the approval by the court is possible should there be a change in circumstances or if new information becomes available which could have a bearing on the suitability of the intended parents.<sup>194</sup> The judge should be empowered to rescind the agreement in such an event. Legislation should provide that no payment be made in relation to the agreement without prior approval of the court.

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191 Vol II 283.

192 Vol II 282.

193 Vol II 283.

194 Vol II 283.

The Law Reform Commission of Saskatchewan has recently published Tentative Proposals for a Human Artificial Insemination Act (1987)

## 8.5 GERMANY

### 8.5.1 THE BENDA REPORT

In 1984 the Minister of Justice and Minister of Research and Technology of the Federal government established a working group under the leadership of Prof Dr Ernst Benda. They were instructed to study the ethical and legal aspects of new technological developments and to make recommendations. In 1985 the Bericht der Arbeitsgruppe: In Vitro Fertilisation, Genomanalyse und Gentherapie was published, popularly referred to as the Benda report.<sup>195</sup> Unlike the Ontario Law Reform Commission Report, the German Report is opposed to all forms of surrogacy.

The report addresses the problems surrounding surrogate motherhood directly,<sup>196</sup> focusing on commercial aspects, transfer of parental power, the possibility of a physical or

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195 Another Commission has been appointed - the Enquete-Kommission - to examine Chancen und Risiken der Gentechnologie. This report could however, not be obtained by the author.

196 At 37 of the report.

mental abnormality of the child and the potential psychological identity problems facing the child in later life. The working group voted against surrogate motherhood in principle and recommended that it should be legislatively prohibited, but recognised that there might be exceptional cases for which regulations may be formulated.<sup>197</sup>

Major concerns were the transfer of the child to the intended parents at birth and the potential conflict which could occur, should the surrogate refuse to do so.<sup>198</sup>

#### 8.5.2 THE BUNDESÄRZTEKAMMER (GERMAN BOARD OF PHYSICIANS)

The German Board of Physicians took a much firmer stand on the issue of surrogacy. The Scientific Council - the official federal body which represents medical practitioners - published two sets of guidelines. The one addresses in vitro fertilisation and embryo transfer as a method for treating human infertility (Richtlinien zur Durchführung von In-vitro-fertilisation und Embryonentransfer als Behandlungsmethode Menschlicher Sterilität),<sup>199</sup> while the

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197 At 42 of the report.

198 At 39 of the report.

199 Published in the 1985 Deutsches Arzteblatt 1691 and reprinted in 1985 Aktuelle Medizin 1 - 7.

other addresses Research on Human Embryos (Richtlinien zur Forschung an Frühen Menschlichen Embryonen).<sup>200</sup>

In an addendum to the guidelines on in vitro fertilisation, surrogate motherhood is briefly mentioned. The well-being of the child is, according to the Bundesärztekammer, the paramount consideration in a decision on whether or not surrogacy should be allowed. The possibility of harm to the child as a result of such an agreement, is according to the Bundesärztekammer great enough to condemn all forms of surrogacy.<sup>201</sup>

It therefore seems clear that on the issue of surrogacy, the opinion of the Benda Commission and the medical profession are that such agreements are unenforceable.

## 8.6 THE NETHERLANDS

The Health Council in the Netherlands issued an interim Report on In Vitro Fertilisation in 1984 and 1986.<sup>202</sup> The Council distinguishes between medical and social grounds for

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200 Published in the 1985 Deutsches Ärzteblatt 3757.

201 Aktuelle Medizin op cit at 6.

202 See 'S Gravehage: Gezondheidsraad 17-10-86 cited by Jorg N in 1987 Freiburg Symposium on Criminal Law and Modern Biomedical Techniques (unpublished report) 19.

utilising artificial procreation techniques. Priority is accorded to treatment on medical grounds and not, for instance, for mere convenience. With regard to surrogacy, the Council advised that commercial surrogacy be made a punishable offence.<sup>203</sup>

## 9 COURT DECISIONS

### 9.1 UNITED KINGDOM

The most important court decisions on surrogate motherhood in the United Kingdom are *A v C*,<sup>204</sup> *In re a Baby*<sup>205</sup> ("Baby Cotton") and recently, *In re Adoption Application*.<sup>206</sup>

The facts in *A v C* were briefly that an unmarried couple of which the female partner was infertile, concluded an agreement with a surrogate to conceive a child by artificial insemination with the male partner's sperm and bear it for them. They offered her 3 000 pounds sterling as compensation. At birth, the surrogate mother, however,

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203 At 18 of the report, cited by Jorg 1987 *Criminal Law and Modern Biomedical Techniques* 21.

204 (1978) 8 Fam Law 170 and 1984 Fam Law 241 C A later reported as (1985) FLR 445 - 461.

205 (1985) NLP Rep 106.

206 Reported in 3 WLR 19-06-1987 31 - 38 and discussed in 1987 Fam Law 259 - 260.

refused to hand the child over to the couple. The genetic father instituted a court action for care and control under the Guardianship of Minors Act 1971. Later he contented himself with a claim for weekly access for a period of two hours. His claim was denied.<sup>207</sup> Comyn J considered the contract to be *contra bonos mores* and decided that "the purported contract (was) for the sale and purchase of a child".<sup>208</sup> Although the validity of surrogacy agreements in general was not considered by the court, there was no hesitation in condemning such agreements. Ormrod J regarded this agreement as "bizarre and unnatural" giving rise to a "miserable" and "deplorable" story. Cumming-Bruce J also condemned this agreement as "a kind of baby farming operation of a wholly distasteful and lamentable kind".<sup>209</sup>

In *In Re a Baby*<sup>210</sup> no reference was made to *A v C* and Latey J did not address the validity of surrogacy agreements, but treated the matter as a custody suit of an illegitimate

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207 At 457 of the report.

208 At 448 E of the report.

209 At 459 of the report.

210 This case is discussed by Brahams D (Editorial) 1985 *Medico-Legal J* 3 - 5; Eaton T A "The British Response to Surrogate Motherhood: An American Critique" 1985 *Law Teacher* 165; Montgomery J "Surrogacy and the Best Interest of the Child" 1986 *Fam L* 59; Freeman M D A "After Warnock - Whither the Law?" 1986 *Current Legal Probs* 33 - 55 and Grubb and Pearl "Medicine, Health, the Family and the Law" 1986 *Fam L* 232 -233.

child. The facts of the case were briefly that a childless couple concluded a surrogacy agreement with a surrogate mother, Kim Cotton. When the baby was born on 4 January 1985, the local authority attempted to obtain an order under the Children and Young Persons Act 1969, preventing the baby from leaving the hospital. The commissioning father issued a wardship summons asking that the child be made a ward of the court and permission to take the baby home with them to America. In this case, the commissioning couple were qualified professionals who, according to the judge, were excellently equipped to meet the baby's emotional and financial needs. He rejected the notion that by merely entering into a surrogacy agreement, they were rendered unsuitable as parents.<sup>211</sup> Custody was granted to the natural father as it was considered to be in the child's best interest.

In June 1987 *In re Adoption Application*<sup>212</sup> (payment for adoption) was heard by Latey J. In this case the family division had to decide whether payments made to a surrogate constitute payment for adoption, which is unlawful in terms of s 50(1) of the Adoption Act, 1958 (as amended) and if so,

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211 At 848 - 849 of the report.

212 *Supra*.



whether the court could authorise the payments made under s 50(3) of the Act.

The facts of the case were briefly that Mr and Mrs A concluded a surrogacy arrangement with Mrs B.<sup>213</sup> Mrs B received 5 000 pounds sterling to cover her loss of wages and expenses during the pregnancy. After the birth of the baby, it was relinquished to the commissioning couple who applied for adoption. The court granted the adoption order and concluded that there was no commercial transaction and the payments to the surrogate were not compensation contrary to the terms of the Adoption Act. The court stated that if "commercial" connotes a profit or financial reward, it was absent in this case. There was no written contract and no lawyers were consulted until after the baby had been born. The arrangement was, according to the court, one of trust which was fully honoured on both sides. If the payments had, however, been made as a reward, which the court doubted, it nevertheless had jurisdiction in terms of s 50(3) of the Adoption Act subsequently to authorise the compensation and would do so since it was in the best interest of the child.

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213 This is the first reported case in which the child was not conceived by artificial insemination, but by sexual intercourse.

In regard to surrogacy agreements in general the court stated the following in an obiter dictum: "Other than those (surrogacy agreements) outlawed by the Surrogacy Arrangements Act 1985, surrogacy arrangements are not against the law as it stands. But those contemplating taking this path should have their eyes open to the kind of pitfalls, obstacles and anxiety that they are likely to meet."<sup>214</sup> The court also stated: "One cannot sit in these courts and hear all the multitude of professionals and others without knowing well the depth of longing in couples, devoted to each other, who cannot have a child through no fault of their own". The court however warned that before couples embark upon the path of surrogacy "they should know very well what it may entail... it is not a primrose path".<sup>215</sup>

#### 9.1.1 EVALUATION OF COURT DECISIONS IN THE UNITED KINGDOM

The English courts have demonstrated a progression from an outright condemnation of surrogacy, especially if compensation is involved, to a gradual tolerance of the procedure. In *A v C* the surrogate refused to hand over the

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<sup>214</sup> At 37 F - G.

<sup>215</sup> At 38 B - C of the report. See also Chalmers D R C "No Primrose Path - Surrogacy and the Role of the Criminal Law" 1989 Med Law 595 - 606.

child at birth, which was not the case in *In Re a Baby* (Baby Cotton). The courts were hesitant to address the validity of the agreement and in *In re a Baby* it was merely treated as a custody suit with the best interest of the child as a paramount consideration. Latey J, who also presided in *In re a Baby*, was even more lenient in *In re Adoption Application* in allowing the adoption even though compensation was involved.

One should bear in mind that these surrogacy agreements were concluded before the **Surrogacy Arrangements Act of 1985**, which declared commercial surrogacy agencies and negotiations illegal, became operative.

## **9.2 COURT DECISIONS IN THE UNITED STATES OF AMERICA**

Surrogate-related cases have enjoyed the attention of the courts in Michigan, Kentucky, District of Columbia, New York, New Jersey and California.

### **9.2.1 MICHIGAN**

Some of the earliest cases on surrogacy were decided by Michigan courts, probably due to the activities of the Michigan attorney, Noel Keane, who established one of the first commercial surrogacy practices in the United States in Dearborn, Michigan - Surrogacy Parenting Services. Despite

this, there is still uncertainty as to the legality of the contract as none of the courts squarely declared surrogacy arrangements illegal. There were, however, indications in certain decisions that commercial or paid surrogacy contracts would be invalid.

*Doe v Kelly*<sup>216</sup> and *Doe v Attorney General*<sup>217</sup> dealt primarily with the constitutional right to procreate, as acknowledged in *Roe v Wade*.<sup>218</sup> In *Doe v Kelly* the applicants petitioned the court to declare the so-called "baby-selling" statute<sup>219</sup> unconstitutional as an impermissible interference with their right to procreate. The trial court in *Doe v Attorney General* rejected the argument and stated that the prohibition on payment for adoption is applicable as the state has an interest to see to it that financial considerations do not interfere with family relationships. If the contract provides for compensation of the surrogate

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216 106 Mich App 169 307 NW 2d 438 (1981).

217 6 Fam Law Rep BNA 3011 Wayne Cty Cir Ct (1980) aff'd 106 Mich App 169 N W 2d 438 (1981) cert denied, 459 US 1183 (1983). See Katz A "Surrogate Motherhood and the Baby-Selling Laws" 1986 Colum J L & Soc Probs 26 - 27 for a discussion of the case. See also Anon "Surrogate Parenthood - An Analysis of the Problems and a Solution: Representation for the Child" 1986 Wm Mitchell L Rev 160.

218 410 US 113 (1973).

219 Mich Comp Laws Ann 710.54 and 710.69 West Supp (1983 - 1984). The statute in question was 710.54 discussed by Katz 1986 Colum J L & Soc Probs 26 n 125.

and adoption is part of the contractual obligations, they forfeit the protection of their right of privacy and even if they still have the right, it is not absolute as the court may uphold state regulations in the presence of a compelling state interest. The court then paid attention to public policy issues underlying baby-bartering and concluded that surrogacy contracts were against public policy.<sup>220</sup>

In the Michigan Court of Appeals<sup>221</sup> the decision of the trial court was confirmed, but on narrower grounds. The court acknowledged the right to privacy of the couple and held that the Michigan statute does not prohibit surrogate motherhood *per se*; compensating the surrogate during adoption proceedings is prohibited, however, and should the couple use adoption proceedings, they are subject to reasonable government regulation.

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220 The court stated that "mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community. It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all states".

221 106 Mich App 169 307 NW 2d 438 (1981) cert denied 459 US 1183 (1983).

In a more recent Michigan surrogacy case, *Syrkowski v Appleyard*,<sup>222</sup> another aspect of a surrogacy agreement was examined as compensation for adoption was not at issue. The plaintiff, who had entered into a surrogacy contract with Ms A, brought an uncontested action under the Michigan Paternity Act<sup>223</sup> seeking an order of filiation declaring his paternity. The proceedings were rejected by the trial court on the ground that such an order would sanction surrogacy arrangements, which according to the court, is against public policy.<sup>224</sup> The intermediate appellate court affirmed the decision of the court *a quo*<sup>225</sup> without determining the validity of the agreement. In the final appeal to the Michigan Supreme Court, the decision was reversed and the proceedings allowed to continue. The court stressed that paternity had to be determined prior to a determination of support obligations. The court found it unnecessary to determine the legality of the surrogate motherhood contract.

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222 First heard by a trial court and later by the Michigan Court of Appeals 122 Mich App 506 333 NW 2d 90 (1983); the case finally reached the Michigan Supreme Court in 1985 420 Mich 367 cited as 362 N W 2d 211 Mich (1985). This case is discussed by Katz 1986 *Columb J L & Soc Probs* 28 - 29 and in the *Wm Mitchell L Rev* 161 -162.

223 Mich Comp Laws 710.33 Supp (1985).

224 At 370 of the report.

225 122 Mich App 506 (1983).

In *Smith v Jones*<sup>226</sup> a lower Michigan court addressed an uncontested claim of maternity in a full surrogacy case where gametes of the commissioning couple were fertilised in vitro and the embryo transferred to the host or gestational mother who was to hand the baby over to the commissioning couple after birth. The court held that the woman who provides the egg to be fertilised and implanted in the womb of the surrogate, is the legal mother of the child.

In *Yeats v Keane*<sup>227</sup>, a circuit court judge in Gratiot county, Michigan, ruled that commercial surrogacy contracts are invalid and unenforceable as they are contrary to public policy.<sup>228</sup> In the case in question a surrogate mother refused to hand over surrogate twins which she bore for an Arkansas couple under a commercial surrogacy contract. It was, however, later reported<sup>229</sup> that the surrogate mother had given up her court battle and that she had agreed to

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226 85-532014 D2 3rd Jud Dist Mich (14 March 1986) cited by Eaton 1986 Neb L Rev 690 n 10; 695 n 34; 723 and 724 n 156 first reported by Annas "The Baby Broker Boom" 1986 Hastings Center Rept 30.

227 Mich Cir Ct Gratiot Cty Nos 9758 & 9772. 21-01-87 14 Fam Law Rep BNA 1160 (1988). Discussed in 1988 ABAJ 29; Russel I "Within the Best Interests of the Child: the Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts" 1988-1989 J Fam L 589.

228 Moss D C "Michigan Surrogacy Fight Ends" 1988 ABAJ 29; Detroit Free Press 22-01-1988.

229 Ibid.

settle the dispute on the ground that the commissioning couple were in a better position to care for the children. The surrogate mother did not receive the \$10 000 specified in the original contract and had to pay some of her hospital and maternity costs. The surrogate mother and her family were allowed six supervised visits totalling 15 days per year with the twins in Arkansas.

From the Michigan cases, three aspects emerge clearly:

- 1 the court may recognise a natural father's paternity in a surrogacy agreement but,
- 2 should the commissioning couple file for adoption (by the wife of the genetic father in partial surrogacy cases), compensation is prohibited, and
- 3 full surrogacy contracts are less troublesome than partial surrogacy, as adoption is not necessary if the court recognises the genetic mother as the legal mother of the child.

#### 9.2.2 KENTUCKY

In *In re Baby Girl*<sup>230</sup> a surrogate mother and her husband petitioned the court seeking voluntary termination of their parental rights so that the genetic father in a surrogacy

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230 9 Fam L rep BNA 2348 Jefferson City Cir Ct (1983); discussed by Katz A 1986 Colum J L & Soc Probs 31 - 32.



agreement could obtain custody and have his name placed on the birth certificate. The court denied the petition based on the presumption of paternity in favour of the husband of the surrogate and lack of evidence by the commissioning father to prove his paternity as he merely filed an affidavit.<sup>231</sup> The court proceeded further by stating that even if the presumption could be rebutted, termination of parental rights is still an inappropriate procedure in this case. The purpose of the termination statute is to provide a mechanism by which a natural parent can terminate his rights and place the child with a licensed child-placing agency and in casu such a placement had been circumvented and the child had already been placed privately.

The second Kentucky case involved one of the first commercial surrogacy agencies, Surrogate Parenting Associates established by Dr Richard Levin in Louisville, Kentucky in 1979.<sup>232</sup>

In January 1981 the Attorney-General of Kentucky concluded in an opinion that surrogate motherhood contracts were illegal under the state's adoption laws and also contravened

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231 At 2348 of the report.

232 Cappuccio M S "Surrogate Motherhood in Ohio: A Dangerous Game of Baby Roulette" 1985 Cap U L Rev 107.

the public policy of the state.<sup>233</sup> This opinion was severely criticised by some writers<sup>234</sup> and led lawyers involved in drafting the contract to stipulate that the surrogate is compensated for hospital and maternity expenses (and not for termination of her parental power or adoption).<sup>235</sup> The state subsequently instituted an action against Surrogate Parenting Associates (reported in the lower court as *Kentucky v Surrogate Parenting Associates Inc*)<sup>236</sup> in which it was alleged that the agency operated in contravention of the following statutes:

- 1 KRS 199.590(2) which prohibits sale, purchase or procurement for sale or purchase of "any child for the purpose of adoption,"<sup>237</sup>
- 2 KRS 199.601(2) which prohibits filing a petition for voluntary termination of parental rights "prior to five days after the birth of a child", and
- 3 KRS 199.500(5) which specifies that a "consent for adoption" shall not "be held valid if such consent for

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233 Ky Op Att'y Gen 81 18.

234 Phillips J W and Phillips S D "In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience" 1980 - 1981 Ky L J 877 - 931.

235 Griffin M K "Womb for Rent" 1981 Student Lawyer 31;  
Brophy K M "A Surrogate Mother Contract to Bear a Child" 1981 - 1982 J Fam L 270 - 272.

236 10 Fam L Rep BNA 1105 Ky Cir Ct (1983).

237 This statute was amended in 1984.

adoption is given prior to the fifth day after the birth of the child".

Judgment in the circuit court was in favour of the corporation, but this was reversed by the Court of Appeals.<sup>238</sup> On 6 February 1986 the case was finally brought before the Supreme Court<sup>239</sup> which, in a majority decision, upheld the decision of the circuit court and found in favour of Surrogate Parenting Associates.

The court distinguished clearly between surrogate motherhood agreements and the purchase and sale of children as prohibited by the statute in question.<sup>240</sup> The court stated that the purpose of the statutory prohibition on compensation was intended "to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child". The central fact in the surrogate parenting procedure is, however, that the agreement to bear the child is entered into prior to conception. The surrogate thus enters the agreement voluntarily and free from coercion. The court

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238 *Kentucky ex rel Armstrong v Surrogate Parenting Assoc.* 11 Fam L Rep BNA 1359 - 60 Ky Ct App (1985) rev'd *Surrogate Parenting Assoc v Kentucky ex rel Armstrong* 704 S W 2d 209 Ky (1986).

239 *Surrogate Parenting Assoc v Kentucky ex rel Armstrong* 704 S W 2d 209 211 Ky (1986).

240 At 211 of the report.

pointed out that surrogate motherhood is biologically the reverse situation from AID, where the husband is infertile<sup>241</sup> and the wife conceives by artificial insemination.

### 9.2.3 DISTRICT OF COLUMBIA

In *in re R K S*<sup>242</sup> surrogacy was merely referred to in a case dealing with the adoption of a surrogate baby by the wife of the childless couple. Details of the procedure were not discussed.

### 9.2.4 NEW YORK

In *Matter of Adoption of Baby Girl*<sup>243</sup> the court was asked to approve a private placement adoption of a surrogate baby and the payment of \$10 000 to the surrogate for her services. In the absence of judicial precedent and statutory authority, the court applied conventional legal principles in reaching its decision. The court stated that the adoption law takes

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241 At 212 of the report.

242 10 Fam L Rep BNA 1383 Fam Div D C Super Ct (1984).

243 L J 505 N Y S 2nd 813 Sur (1986). This case is discussed by Moss "Surrogate Parenting Debate" 1987 ABAJ 25 and in the New York State Senate Judiciary Committee Report Surrogate Parenting in New York: A Proposal for Legislative Reform 1986 at 36 - 8.

precedence over contractual terms and should these violate statutory requirements, the court may declare the contract illegal and deny the petition.<sup>244</sup> The adoption and payment was, however, approved by the court which considered it to be in the best interest of the child. The court stated that a denial would not prohibit future surrogacy agreements and would be a declaration that such contracts are against public policy - a decision which should be left to the legislature as "judicial" legislation by the court is impermissible.<sup>245</sup>

#### 9.2.5 NEW JERSEY

The legality and enforceability of surrogate motherhood agreements were specifically addressed for the first time by Sorkow J in 1987 in the Supreme Court, Hackensack, New Jersey in the much publicised, Baby M (Whitehead/Stern) case.<sup>246</sup> In this case the court held that a surrogate motherhood contract is valid and does not constitute selling a child as it is impossible for a father to purchase what

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244 At 978 of the report.

245 At 978 of the report.

246 Also referred to as the Baby M I case 217 N J Super 313 323 315 A 2d 1128 1132 Ch Div (1987) rev'd in part, 109 N J 296 537 A 2d 1227 (1988). For an in-depth discussion, see Stern I 1988 - 1989 J Fam L 587 - 671. See also the discussion in chapter 5 under Law of Persons.

already belongs to him. Sorkow J agreed to an order for specific performance only after the court was satisfied that it would be in the best interest of the child. Mr Stern was awarded custody and the court then allowed the baby to be adopted by Mrs Stern.

The Baby M case was heard on appeal in the New Jersey Supreme Court (*Baby M II*).<sup>247</sup> The court held that although the contract was invalid and unenforceable, as payment of money was impermissible in adoption cases, it was in the best interest of the child to stay with the commissioning couple and not be handed back to her surrogate mother, who was merely granted visitation rights.

#### 9.2.6 CALIFORNIA

In *Huro v Muñoz*<sup>248</sup> a Mexican cousin of a (Mexican) American couple acted as surrogate mother for them. This case provides an apt example of the problems which can arise if legal counselling is not obtained and language barriers

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247 *In re Baby M* 109 N J 396 410 - 11 537 A 2d 1227, 1234 (1988). For a detailed discussion, see Stern 1988 - 1989 J of Fam L 585 - 671. See the discussion in chapter 5 under Law of Persons.

248 Discussed in detail by Andrews L 1989 *Between Strangers* 113 et seq; Charo R A "Legislative Approaches to Surrogate Motherhood" in 1990 *Surrogate Motherhood* Gostin (ed) 95.

prevent consensus between the parties. In casu the surrogate mother, who spoke no English, understood that she was to undergo in vivo<sup>249</sup> fertilisation, embryo flushing and transfer to the commissioning wife. The commissioning couple, on the other hand, asserted that a full-term pregnancy was contemplated. They relied on a handwritten contract and oral communication as proof of their intentions. In exchange for the services of the surrogate mother, the couple were to provide clothing, food, health care and assistance in obtaining a visa for permanent residence in the USA. It was apparently further agreed upon that the couple would provide housing for the Mexican surrogate in violation of immigration regulations.

When the baby was born, the surrogate was unwilling to hand her over to the intended parents, but eventually did so under duress. In the subsequent court battles, Pate J expressed the view that as a general rule, surrogacy contracts entered into with appropriate safeguards were valid. This particular agreement was, however, concluded under duress as the surrogate was already pregnant and was forced to sign the contract. In the absence of a valid contract, family law principles were applicable to decide custody and visitation rights. Joint custody - which is

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249 Inside the body - as opposed to in vitro (outside the body), performed in a petri dish in laboratory.

favoured in custody disputes in California - was awarded to the parents. Pate J, however, expressed his hope that the parties would come to a decision they could live with regarding custody and visitation. Unlikely as it may seem, this indeed happened and the child's custody is still shared by the surrogate (her genetic mother) and the commissioning couple.

In the unique case of *Johnson v Calvert*<sup>250</sup> a Californian surrogate who agreed to carry the foetus of a Californian couple to term, sued for custody, child support and damages, alleging that the couple had lost interest in the pregnancy and failed to provide the agreed financial and emotional support. Ms Johnson was to receive \$10 000 for her services.

Parslow J concluded that the surrogate mother had no right to a role in the upbringing of the child and that she was a "genetic and hereditary stranger" to the child. Custody was awarded to the Calverts (genetic parents) and the surrogate's visitation rights terminated.<sup>251</sup>

#### 9.2.7 EVALUATION OF COURT DECISIONS IN THE UNITED STATES OF AMERICA

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250 Reported in *Time* 27-08-1990 52; *Newsweek* 27-08-1990 66.

251 *Detroit News* 23-10-1990; *New York Times* 23-10-1990.



It is difficult to evaluate court decisions in the USA, because of the diversity of approaches and the differences in interpretation of public policy in individual states. However, it is clear from the court decisions, that the best interest of the child remain the paramount consideration.

### 9.3 GERMANY<sup>252</sup>

Surrogacy-related issues have been addressed by the German courts on two occasions. In the first - a custody suit - the contract was declared void and custody was awarded to the surrogate mother. In the second case, it turned out that the surrogate's husband was the genetic father of the child. The court ordered re-payment of expenses to the commissioning father.

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252 Information obtained from Garrison M "Surrogate Parenting: What Should Legislatures Do? Special Issue on Surrogacy 1988 Fam L Q 159.

## 10 LEGISLATION

### 10.1 UNITED KINGDOM

The Surrogacy Arrangements Act was enacted in 1985. It was based on the recommendations of the Warnock Commission (1984)<sup>253</sup> and possibly also as a result of the controversial "Baby Cotton case."<sup>254</sup>

The Act is divided into four main sections. Section 1 contains definitions. In terms of s 1(2) "surrogate mother" means a woman who carries a child in pursuance of an arrangement -

- (a) made before she began to carry the child, and
- (b) made with a view to any child carried in pursuance of such arrangement.

"Payment" in terms of the Act means payment in money or money's worth.<sup>255</sup>

Section 2 of the Act is entitled "Negotiating surrogacy arrangements on a commercial basis, etc".

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253 Discussed under United Kingdom Court Decisions *supra*.

254 Ibid.

255 S 1(8) of the Act.

Although the Warnock Committee did not consider surrogate practices as such to be unlawful,<sup>256</sup> it nevertheless recommended that "legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother".<sup>257</sup> This recommendation was incorporated into s 2 of the Surrogacy Arrangements Act, which attempts to prevent third parties, especially commercial surrogate agencies, from deriving financial benefit from surrogacy agreements.<sup>258</sup> Any person or agency which initiates, takes part in or agrees to negotiate or compile information with the view of using it in surrogacy arrangements on a commercial basis, will be held criminally liable.<sup>259</sup>

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256 At par 8.4 of the report.

257 At par 8.18 of the report.

258 In terms of s 2 of the Act any person who acts on behalf of a body of persons or who takes part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom and who receives payment for such services is guilty of an offence and can face a fine or imprisonment of up to three months (s 4). In terms of s 4(2)(a) the consent of the Director of Public Prosecutions is essential for any prosecution.

259 S 2(1)(a) (b) and (c).

Surrogates as well as commissioning couples are, themselves, exempt from criminal liability.<sup>260</sup>

Section three is entitled "Advertisements about surrogacy". The Act specifically prohibits the recruitment of women as surrogate mothers in a number of ways. Examples are newspaper or periodical advertisements and advertisements through telecommunication systems.<sup>261</sup> Those who are responsible for such advertisements, commit an offence in terms of the Act. The same applies to editors of newspapers and periodicals who publish them.<sup>262</sup>

S 4 of the Act contains "Offences". The Act itself does not provide for penalties but refers to "standard scales" contained s 75 of the Criminal Justice Act 1982.

Certain conclusions may be drawn from omissions in the Act,<sup>263</sup> for instance that surrogate agreements as such are not prohibited<sup>264</sup> and that they are not declared

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260 S 2(2)(a) and (b).

261 S3(2) (3) (4) and (5).

262 S 3(2).

263 Freeman 1986 Current Legal Probs 39; Condie "Surrogacy as a Treatment for Infertility" 1986 J Law Society of Scotland 472.

264 The recommendation of the Warnock Commission (par 8.18  
(Footnote Continued)

unenforceable. In fact, s 1(9) states that the Act "applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them".<sup>265</sup> Contracting parties may use the services of a person or agency as long as no compensation is involved. The commissioning couple may, however, compensate the surrogate as long as the transaction is not handled on a commercial basis by a person or agency.<sup>266</sup> It is thus clear that the thrust of the Act is to prevent commercial agencies, similar to those in the USA<sup>267</sup> from operating in Britain.<sup>268</sup> Altruistic or family arrangements, on the other hand, seem to be legal.

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(Footnote Continued)

of the report) that it be provided for by statute that all surrogacy agreements be illegal contracts and therefore unenforceable in the courts, was not followed in this regard.

265 This section of the Act has been criticised for being ambivalent on the legal status of surrogacy agreements. Eaton "The British Response to Surrogate Motherhood: an American Critique" 1985 *Law Teacher* 171. On 7 November 1990 an amendment of this section became operative. S 36 of the Human Fertilisation and Embryology Act 1990 provides that "(n)o surrogacy arrangement is enforceable by or against any of the persons making it".

266 S 2(1) and 2(5).

267 For a list of the surrogate mother programmes in the United States of America see Andrews 1984 *New Conceptions* 317 - 318.

268 Freeman 1986 *Current Legal Probs* 40 mentions that the Act had limited aims, namely to "rid society of the perceived evil of commercial surrogacy".

## 10.1.1 EVALUATION OF THE SURROGACY ARRANGEMENTS ACT

The Surrogacy Arrangements Act has been described as a "stop-gap measure" or a result of "moral panic"<sup>269</sup> after the "Baby Cotton" controversy. Both Freeman<sup>270</sup> and Condie<sup>271</sup> are of the opinion that the Act is not operating effectively and that too many loopholes exist.<sup>272</sup> Sloman<sup>273</sup> and Eaton<sup>274</sup> criticise the Act for avoiding all the major issues relating to surrogacy, especially birth registration and the status of the child, and Payne<sup>275</sup> suggests that the Act may create even more problems than it solves.

Despite the fact that the Act was enacted expressly to prohibit commercial surrogacy agencies, these agencies still operated a year after the implementation of the Act. An organisation which apparently paid women acting as surrogate

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269 Freeman 1986 Current Legal Probs 38 and 51 n 40.

270 1986 Current Legal Probs 41.

271 J Law Society of Scotland 472.

272 Freeman 1986 Current Legal Probs 40 also expresses his doubts as to whether the Act covers complete surrogacy, where the genetic material of the commissioning couple is used and the surrogate is a mere carrier.

273 "Surrogacy Arrangements Act 1985" 1985 New L J 980.

274 1985 Law Teacher 171.

275 "The Regulation of Surrogate Motherhood" 1987 Fam L 179.

mothers, was not prosecuted because the company claimed that women were paid to keep diaries of their pregnancies and not for carrying babies.<sup>276</sup>

#### 10.1.1.1 THE IMPLICATIONS OF S 2 OF THE SURROGACY ARRANGEMENTS ACT ON PROFESSIONAL INVOLVEMENT

A careful and objective analysis of the Surrogacy Arrangements Act and its implications, is required for an assessment of local options. According to Freeman<sup>277</sup> and Eaton<sup>278</sup> the wording of s 2 of the Act is so wide that even a doctor or lawyer assisting the parties, or merely providing legal advice for a fee, may run the risk of being prosecuted.<sup>279</sup> If altruistic surrogacy is allowed, it seems unsatisfactory not to provide parties to the agreement with

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276 For a discussion see Condie J Law Society of Scotland 472; Freeman 1986 Current Legal Probs 41 with reference to The Guardian 12-11-1985.

277 1986 Current Legal Probs 39.

278 1985 Law Teacher 172.

279 When the question of professional involvement arose during the passing of the Bill through Parliament, the Minister of Health at that stage, Kenneth Clarke, sought to reassure the members of the House of Commons. According to him, a lawyer may provide general legal advice to clients about surrogacy. In cases where consensus has already been reached on both sides, a document may be drafted setting out the agreement in legal language, as this excludes the possibility of the lawyer "negotiating" the contract. However, he cautioned lawyers to avoid any actions which could be construed as "taking part in negotiations" or offering or agreeing to negotiate." For a discussion see Sloman S "Surrogacy Arrangements Act" 1985 New L J 979.

the help of professionals in both the legal and medical fields. Eaton<sup>280</sup> points out that the Act as it stands, "may encourage amateurish agreements" and "the couple and surrogate are left to stumble through the process without the help of experts". It is furthermore unreasonable to expect professionals in such a specialised field, not to be compensated for their services. As stated by Sloman,<sup>281</sup> it seems that "in seeking to stop third parties profiteering, the draftsman has failed to deal satisfactorily with the position of those who would provide such services for a fee".

#### 10.1.1.2 FURTHER LEGISLATIVE DEVELOPMENTS

Towards the end of 1985 the Surrogacy Arrangements (Amendment) Bill<sup>282</sup> was introduced as an attempt to extend the existing Act. In terms of the Bill it would have been an offence for any person knowingly to take part in, or assist in the establishment of a surrogate pregnancy. It was also aimed at outlawing non-commercial bodies or agencies negotiating or establishing surrogacy arrangements and to

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280 1985 Law Teacher 172.

281 1985 New L J 980.

282 Condie 1986 J Law Society of Scotland 472; Morgan D "Legislation - Who to Be or Not to Be: The Surrogacy Story" 1986 Mod L Rev 365.



remove the present immunity from prosecution of the parties to the contract. This Bill was, however, never implemented. It was decided to determine public opinion prior to the enactment of legislation on the issue. For this purpose a document entitled **Legislation on Human Infertility Services and Embryo Research: A Consultation Document**,<sup>283</sup> was produced in December 1986 and circulated to a wide range of organisations for response before 30 June 1987.

The purpose of the consultation document, according to Parker<sup>284</sup>, seems to have been primarily "to elicit more detailed comments in respect of recommendations of the Warnock Committee which have so far, received relatively little attention, but a secondary purpose is, apparently, to reopen certain controversial areas, presumably in the hope of establishing greater consensus".

Responses were invited on infertility treatment in general, especially the possibility of instituting a separate licensing authority, counselling of the parties, regulating the legal status of children born as a result of certain

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283 DHSS Cm 259 HMSO. Also discussed by Parker D "White Paper on Human Fertilization and Embryology" 1988 Fam L 303 - 305.

284 "Legislation on Human Infertility Services and Embryo Research" 1987 Fam L 168 - 171.

infertility treatments such as surrogate motherhood, record-keeping and enforceability of surrogacy contracts.

When the consultation period ended in June 1987, the Government reaffirmed its intention of introducing comprehensive legislation in Parliament and promised a White Paper on the form it would take. The White Paper was discussed and opened for debates in both Houses of Parliament prior to the presentation of a proposed Bill.

An important aspect of the White Paper is the recommendation that an independent Statutory Licensing Authority (SLA) be established.<sup>285</sup> The functions of the proposed body are outlined in the document, eg issuing of licences<sup>286</sup> and the duty of compiling codes of practice for the regulation of infertility services.<sup>287</sup>

Surrogacy is dealt with in detail in the White Paper.<sup>288</sup> From the discussion, it seems clear that no consensus could be reached on a number of issues, such as permitting or prohibition of private surrogacy arrangements, the extent of

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285 At par 11.

286 At par 20 and 21.

287 At par 26.

288 At par 64 - 75.

liability of the parties and professionals involved<sup>289</sup> and the role legislation should play.<sup>290</sup>

The most important aspects which emerged from the responses to the Consultation Paper, and which were to be included in a Bill on Human Infertility, regulating surrogacy, were the following:

- 1 Legislation should not encourage any form of surrogacy, whether it is privately arranged or on a non-commercial basis. A proposed bill should therefore contain no provision for the licensing of such practices and surrogacy agreements should be unenforceable in all respects in the U K courts.<sup>291</sup> The practice of surrogacy - other than by commercial agencies, already prohibited under the Surrogacy Arrangements Act 1985 - should not be brought within the scope of the criminal law and the bill should not add to the criminal sanctions contained in the 1985 Act.
- 2 Sums paid to a surrogate mother should not be recoverable by the commissioning parents and the surrogate mother should not be permitted to recover

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289 At par 70 - 71.

290 At par 72.

291 At par 73.

expenses she incurred if the commissioning parents changed their minds about the agreement.

The SLA should be given the task of studying the practice of surrogacy in Britain and reporting to the Ministers involved, so that Parliament may review the situation periodically.<sup>292</sup> The bill should furthermore contain a provision empowering the Secretary of State to make regulations extending the scope of activities controlled by the SLA. Should non-commercial surrogacy, for instance, at a later stage, be considered a viable option, it may be brought within the framework of the law.<sup>293</sup>

Two years after the the White Paper was published in 1988, the Human Fertilisation and Embryology Bill was introduced. This Bill represents the Government's response to the recommendations made in 1984 by the Warnock Committee.

Issues addressed in the bill include the status of children born as a result of assisted conception and specifically AID<sup>294</sup> GIFT<sup>295</sup> and embryo transfer.<sup>296</sup>

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292 At par 74.

293 At par 75.

294 Artificial insemination with donor sperm.

295 Gamete intra-Fallopian transfer.

(Footnote Continued)

Provision is also made for adults who were born as a result of such techniques, to obtain information about their genetic heritage.<sup>297</sup> The Bill proposes the establishment of the Human Fertilisation and Embryology Authority.<sup>298</sup> The Bill contains comprehensive provisions regarding research on live embryos and storage of gametes and embryos.<sup>299</sup>

The Bill also proposes direct regulation of surrogacy. Clause 33 provides for the amendment of the Surrogacy Arrangements Act 1985. In terms of s 1(a) of the proposed Act "no surrogacy arrangement is enforceable by or against any of the persons making it". This was recommended to place the legal position of such agreements beyond doubt.<sup>300</sup>

As a result of a surrogacy case, described to the House of Commons by one of the members, a new clause was added to the Bill under the heading "parental orders in favour of gamete donors". The case discussed was one of full surrogacy. The

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(Footnote Continued)

296 Clauses 26 - 28.

297 Clause 29.

298 Clause 5.

299 Clauses 11, 12, 13, 14, and 16.

300 This amendment was included in s 36 of the Human Fertilisation and Embryology Act 1990.

facts were briefly that the intended parents concluded an agreement with the surrogate, as the intended mother had no uterus and was incapable of bearing children. She could, however, produce ova, which were inseminated with her husband's sperm and a number of embryos were transferred to the host/surrogate mother. In due course the surrogate gave birth to twins and handed them over to the genetic parents. The couple were then informed that they needed to adopt the twins to secure their status. They were unwilling to do so as they regarded the twins as their own children.<sup>301</sup>

Wardship proceedings were subsequently instituted by the local authority for the area in which the couple resided. They advanced the argument that the couple were not the legal parents, but merely foster parents to the twins and should therefore comply with the provisions of the Foster Children's Act 1980. In terms of s 2(2)(a) of this Act, notification and other regulations are applicable to the situation. As the issue had at that stage been raised in Parliament and direct legislation was expected, the local authority agreed to the application being adjourned. The children remained wards of the court, but were left in the care and control of their parents.

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301 For a discussion see "Current Topics" 1990 Pract Child L Bull 107; 1991 Pract Child L Bull 7 - 8.

When the Bill returned to the House of Lords during October 1990, the specific clause was approved without opposition and included in the Human Fertilisation and Embryology Act 1990.<sup>302</sup> Special provision is made for full surrogacy cases. The Lord Chancellor said: "It seems to us that there must be some legal means available, including proper safeguards for the child, whereby courts can order a child to be treated in law as the child of those who contributed the embryos or eggs or sperm which are placed in the carrying mother."<sup>303</sup>

In a discussion of the case<sup>304</sup> it was explained that the new Human Fertilisation and Embryology Act will contain the provision that the gestational mother is the mother of a child born as a result of assisted procreation. If she was married at time of the placing of the embryo(s) in her womb, but "the creation of the embryo was not brought about with the sperm of her husband, the husband shall be treated as the father unless it is shown that he did not consent to the treatment".

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302 S 30 under Parental orders in favour of gamete donors. See the discussion *infra*.

303 House of Lords Debate Vol 522 c 1115 cited in 1991 Pract Child L Bull 8.

304 1991 Pract Child L Bull 8.

In terms of the Human Fertilisation and Embryology Act, which was subsequently enacted, the court may make an order providing that the a surrogate child is the legal child of the intended parents.<sup>305</sup> The couple must apply within six months after the birth of the child for such an order,<sup>306</sup> which the court will only make if it is satisfied that: at the time of the application and making of the order

- 1 the child's home is with the husband and the wife; and
- 2 the husband or the wife or both of them are domiciled in the UK or the Channel Islands or the Isle of Man.<sup>307</sup>

The parents must be eighteen years or older at the time of the application and order<sup>308</sup> and the surrogate mother and her husband must have unconditionally agreed to the order.<sup>309</sup> The court must be satisfied that no compensation (over and above necessary expenses) has been given or received by any of the parties.<sup>310</sup>

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305 S 30(1)(a).

306 S 30(2).

307 S 30(3)(a) and (b).

308 S 30(4).

309 S 30(5).

310 S 30(7)(a) and (b).



## 10.2 AUSTRALIA

The Infertility (Medical Procedures) Act was enacted in 1934, based on the recommendations of the Waller Commission<sup>311</sup> appointed by the Victoria government in 1982 to examine the legal, social and ethical issues resulting from in vitro fertilisation. In terms of this Act, surrogacy is prohibited, whether the arrangement is "formal or informal, and whether or not for payment or reward...".<sup>312</sup> Such contracts are void.<sup>313</sup> Agencies as well as parties to such contracts will be held criminally liable if compensation is involved.<sup>314</sup> The recruiting of women to become surrogates is prohibited as is any form of advertising in regard to surrogacy arrangements.<sup>315</sup>

This Act is therefore a step ahead of the British Act in discouraging surrogacy agreements. According to Kennan,<sup>316</sup> Attorney General for Victoria, ad hoc legislation such as

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311 See discussion *supra* on the Waller Commission. See in general "Current Topics" 1985 Austl L J 306.

312 S 30(1) of the Act.

313 S 30(3) of the Act.

314 S 30(2) of the Act.

315 S 30(2)(a).

316 "Science and the Law - Lessons from the Experience of Legislating for the New Reproductive Technology" 1985 Austl L J 490.

the Infertility (Medical Procedures) Act, is, however, not ideal. On the one hand, infertility specialists in Victoria have obtained excellent results with in vitro programmes and would like to continue with their research. The public, on the other hand, do not adequately understand such relatively new technological advances and are often in principle opposed to it. Legislation on modern birth technology, can, according to Kennan, be regarded only as an interim measure to provide the minimum level of regulation.

The Act is also criticised as not being comprehensive enough.<sup>317</sup> It is suggested that the Act will serve no purpose in preventing persons from advertising outside the state of Victoria or from travelling to another country where surrogacy is legal.<sup>318</sup> The Act is also criticised for merely stating that surrogacy arrangements are "void", instead of "void and illegal". It is concluded that the Act is to a large extent ineffective and that regulation, control and supervision of the procedure, may represent a better alternative.<sup>319</sup>

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317 "Current Topics" 1985 Austr L J 306 - 307.

318 1985 Austr L J 307.

319 Ibid.

It is believed that the Infertility (Medical Procedures Act) may be amended in the near future.

### 10.3 THE UNITED STATES OF AMERICA

It is important to keep in mind that health matters are regulated separately by each of the states of the USA. Since the Baby M case in the state of New Jersey, the issue of legislation on surrogate motherhood has enjoyed considerable attention in several states.

The legislative position in the United States as it was at the end of 1990 is discussed.

Artificial insemination is at present regulated by thirty states<sup>320</sup> while only a few states have enacted legislation that touches on surrogacy.<sup>321</sup> The majority of states are still considering bills, ranging in complexity from a blanket authorisation to a detailed regulation<sup>322</sup> of the

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320 Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming as cited by Andrews 1987 Hastings Center Rept 40 n 3.

321 See the discussion infra.

322 An example of the detailed regulation approach is  
(Footnote Continued)

entire process, closely parallel to the regulation involved in adoption of children.<sup>323</sup> According to Andrews<sup>324</sup> the proposed bills range from "horrified prohibition to cautious facilitation" of surrogacy.

It is impracticable to discuss the detail of all the proposed bills as the legislative scene is constantly changing. Only the main features are, therefore, examined, particularly those dealing with legality and enforceability of surrogate motherhood contracts. The finer points such as termination of parental power, informed consent, advertising, and breach of contract are considered separately when specific legal problems are addressed.

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(Footnote Continued)

proposed legislation in South Carolina H R 3491 (1982); Hawai HR 1009 12th Leg (1983); Conn Assembly 5316 Jan Sess (1983).

323 For a detailed discussion of the various models, see Katz "Surrogate Motherhood and the Baby Selling Laws" 1986 Colum J L & Soc Probs 1 - 53.

324 1987 Hastings Center Rept 31.

### 10.3.1 SURROGACY LEGISLATION<sup>325</sup>

In the aftermath of the Baby M case, at least six states readily enacted legislation banning commercial surrogate motherhood. Florida,<sup>326</sup> Indiana,<sup>327</sup> Kentucky,<sup>328</sup> Louisiana,<sup>329</sup> Michigan<sup>330</sup> and Nebraska<sup>331</sup> enacted legislation rendering surrogacy contracts void and unenforceable if compensation is involved. During 1989

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- 325 Information obtained from: Andrews 1987 Hastings Centr Rept 31 - 40; Adams M "Status of State Legislation Proposed or Enacted through 5 October 1988" in Surrogate Motherhood 1990 Gostin (ed) 261 - 269; "Developments in the Law - Medical Technology and the Law" 1990 High Tech L J 224 - 225. Russel "Within the Best Interest of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts" 1988 - 1989 J Fam Law 585 - 671.
- 326 1988 Fl S-9 (same as H-1633) coded as 1988 Fla Laws 143.
- 327 IN S-98 (Johnson) 317/232-9400 (1988) coded as Ind Stat Ann par 31-8-2-1 Burns Supp (1989),.
- 328 KY BR-219 S-4 (Travis) 502/564-8100 (1988) coded as Ky Rev Stat Ann par 199.590 3 (Michie/Bobbs-Merrill) Supp (1988). "Developments in the Law - Medical Technology and the Law" 1990 Harv L Rev 1548.
- 329 La HB 327 Act No 583 (1987) codified as R S 9:2713; Nev Rev Stat CH 773 Sec 6(5) (1987) cited by Andrews 1987 Hastings Center Rept 31 and 40 n 7.
- 330 MI S-228 (Einsfield) 517/373-2413 (1988) coded Mich Comp Laws Ann par 722.851-722.863 West Supp (1989); 1990 Harv L Rev 1548.
- 331 NE LB-674 402/471-2612 (1988) coded as Neb Rev Stat par 25-21 200 Supp (1988).

Arizona<sup>332</sup> enacted legislation prohibiting surrogacy contracts. During the same year legislation was enacted in Utah<sup>333</sup> declaring it a misdemeanor to enter into a surrogacy contract for profit and which renders all such agreements void. Washington<sup>334</sup> approved legislation whereby it is a misdemeanor to enter into a surrogacy contract for profit and which renders all such agreements void.

#### 10.3.2      **SIGNIFICANT ASPECTS OF LEGISLATION ON SURROGACY IN THE UNITED STATES OF AMERICA**

Arkansas legislation provides that the gestational mother of a child born by artificial insemination, is the legal mother, except in the case of surrogate mothers, where the intended mother is considered the legal mother of the child. If a couple contracts with an unmarried surrogate, the couple is the legal parents of the child and not the surrogate.<sup>335</sup>

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332 Act approved 28-04-1989 Ch 114 1989 Ariz Sess Laws 393 codified at Ariz Rev Stat Ann Par 25-218 and as amended at Ariz Rev Stat Ann par 36-322 (1989); See 1990 High Tech L J 224.

333 Act approved 13-05-89 No 647 1989 Ark Act codified as amended at Ark Stat Ann par 9-10-201 (1989).

334 Act approved 13-05-1989 ch 404 Wash Laws 2178 codified at Wash Rev Code par 26.26.210 to 26.26.260 (1990).

335 Ark Rev Stat Ann Sec 34-720 - 21 B Supp (1985) which simply provides in relation to surrogate motherhood that: "A child born by means of artificial insemination to a woman who is unmarried at the time of birth of the  
(Footnote Continued)

If an anonymous donor's sperm is used for the insemination, the child is the child of the woman intended to be the parent.

In Arizona the surrogate mother is declared the legal mother, and, if she is married, her husband is the presumed father.

The Florida Act provides for "pre-planned adoption". Informal surrogacy arrangements are not completely prohibited. If an agreement provides for compensation - over and above actual expenses and fees for adoption - such an agreement is unenforceable. The agreement will, however, still be evidence of the intent of the parties. "Pre-planned adoption" agreements must contain certain minimum terms. Non-compliance with such agreements carries a

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(Footnote Continued)

child, shall for all legal purposes be the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of the woman intended to be the mother (My emphasis). For birth registration purposes in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth can be issued upon orders of a court of competent jurisdiction. See Special Project "Legal Rights and Issues Surrounding Conception, Pregnancy and Birth" 1986 Vand L Rev 638 n 183 - 4. The Arkansas statute is also cited by Andrews 1987 Hasting Center Rept on 21 and 40 n 6 and 1990 Harv L Rev 1549 and n 161.

fine not exceeding \$5 000 and/or imprisonment of up to five years.<sup>336</sup>

In the Indiana legislation, surrogacy as such is not prohibited, but once compensation, over and above necessary expenses, is involved, the agreement is void and unenforceable. Violation of surrogacy legislation carries a penalty of up to two years imprisonment and/or a \$10 000 fine. Penalties for violations are contained in the "child selling" statutes. "Pre-planned adoptions" are unlawful and such agreements may only be concluded after the birth of the child.

Kansas<sup>337</sup> legislation does not actively oppose surrogate motherhood. Compensation to the surrogate is not directly addressed. Advertising of surrogate services is excluded from the ban on advertising for the adoption or placement of children.

In Kentucky<sup>338</sup> surrogacy agreements are prohibited and unenforceable if compensation to the surrogate, or surrogacy agencies is involved. Non-commercial surrogacy agreements

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336 1990 Surrogate Motherhood Gosten (ed) 262.

337 Kan Stat Ann par 65-509(d) (1985); 1990 Harv L Rev 1549 and n 161.

338 Ky Rev Stat Ann par 199.590(3) (1988).



are permitted. Penalties for non-compliance are contained in the "child selling" statutes.<sup>339</sup> Fines are set at not less than \$500, but not more than \$2 000 and/or six months imprisonment.

In terms of the 1988 Michigan<sup>340</sup> Act, it is a crime to enter into, or assist in the formation of a surrogacy contract for compensation. Surrogacy brokers can face fines of up to \$50 000 and/or imprisonment of up to five years.

Participants in commercial surrogacy contracts, where compensation over and above actual medical expenses are paid, may face a fine of up to \$10 000 and/or imprisonment of up to one year.

The Nebraska<sup>341</sup> legislation declares surrogacy contracts involving compensation void and unenforceable. No penalties are provided for violation and non-commercial surrogacy agreements are not prohibited.

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339 KRS 199.590.

340 Mich Comp Laws Ann par 722.851-722.863 (1989).

341 Neb Rev Stat par 25-21.200 Supp (1988).

New Hampshire<sup>342</sup> permits surrogacy agreements, but grants the surrogate mother a period of seventy-two hours after the child's birth within which she may lawfully decide to keep the child. The legislation is comprehensive. It includes provisions requiring judicial pre-authorisation of surrogacy contracts, careful screening and home studies of the parties prior to judicial approval. The legislation restricts surrogacy to married couples.

In the Utah<sup>343</sup> legislation the surrogate mother, if she is married, and her husband, are deemed the child's legal parents.

The Washington<sup>344</sup> legislation provides no presumption regarding parenthood of the surrogate child but requires a court to determine who should have custody based on certain enumerated factors.

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342 1990 N H House Bill 1426 F N par 168-B codified N H Rev Stat Ann par 168-B (effective Jan 1991); 1990 Harv L Rev 1548.

343 Utah Code Ann par 6-7-204 (1990).

344 Wash Rev Code par 26.26.210 to 26.26.260 (1990).

Proposed legislation related to surrogate motherhood has been introduced in over half the state legislatures since 1980.<sup>345</sup>

### 10.3.3 SIGNIFICANT ASPECTS OF PROPOSED LEGISLATION IN THE UNITED STATES OF AMERICA

#### 10.3.3.1 LEGALITY

Some states<sup>346</sup> have proposed bills banning surrogacy altogether.<sup>347</sup> Some bills<sup>348</sup> are specifically aimed at prohibiting commercial surrogacy (where third parties and the surrogate make large profits).<sup>349</sup> Some will allow only unpaid or altruistic surrogacy, whereas compensation of the surrogate for necessary expenses and under a regulatory

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345 Charo R A in 1990 Surrogate Motherhood Gostin (ed) 96 and references cited at 116 n 34.

346 Alabama, Illinois, Iowa, Maryland and Wisconsin.

347 Alabama H 2 Sec 1 (Rains); Illinois H B 2101 Sec 3 (Granberg); Iowa S F 358 (Hannon); Maryland HB 613 Sec A (Mitchell); Wisconsin Proposal (Rep Merkt); cited by Andrews 1987 Hastings Center Rept 40 at 8.

348 For instance Florida, Kentucky, Michigan, New Jersey, New York, Oregon and Pennsylvania.

349 Florida S B 1081 Sec 63.212(1)(i) (Ros-Lehtinen); Kentucky 88 R S BR 219 Sec 3 (Travis); Michigan SB 228 Sec 9(1) (Binsfeld et al); New Jersey NJ A 4138 sec 2 (Kavanaugh et al); New York AB 5529 55-801 (1) (Schmidt); Oregon Or S B 456 Sec 2 (Hill and Kerans)(Felonv) and Pennsylvania Pa H B 570 Sec 4305 (by Markosek) cited by Andrews 1987 Hastings Center Rept 40 n 9.

scheme, ranging in complexity, is provided for by others.<sup>350</sup> Statutes proposed in at least twelve states: California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania and South Carolina, would allow either paid or unpaid surrogacy.<sup>351</sup>

#### 10.3.3.2 ENFORCEABILITY

In the majority of proposed bills and legislation already enacted, commercial surrogacy agreements are considered unenforceable.<sup>352</sup> In some legislation or proposed

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350 District of Columbia (D C Consumer Protection and Regulation of Surrogate Parenting Centers Act of 1987, Bill 7-176 s 6(e) (Ray)) and alternative bills in Florida (Fla S B 1297 Sec 1(3)(a) (Frank) in which payment may not be conditioned on the termination of parental rights. See also New York (A B 2403 sec 65-a (by Halpin) cited by Andrews 1987 Hastings Center Rept 40 n 10.

351 Cal A B 1707 (Duffy et al); Ill S B 1510 (D'Arco); Ill S B 1111 (Marovitz); Md HB 759 (Athey); Mass HB 5314 (Morin); Mich H B 4753 (Clack et al); Minn H F 1647 (Bishop et al); Mo H B 480 (Committee on Children, Youth and Families); N.J Assembly No 3038 (Kern); N J S 767 (DiFrancesco); N Y S B 1429 (Dunne et al); Or HB 3307 (Bunn et al); Or S B 384 (Hamby); Pa HB 776 (Reber); also Pa S 742 (Lewis), which is identical to HB 776 except that it does not allow the surrogate to change her mind; S C S 626 (Thomas) cited by Andrews 1987 Hastings Center Rept 40 n 22.

352 Alabama Ala H 1113 (Mc Kee et al); Minnesota Minn S F 1167 (Brandt et al) and Minn H F 1584 (Kelly et al); Nebraska (Neb L B 674 (Chambers) and New York (N Y S B 4641 (Marchi); H B 6277 (Barnett et al) cited by Andrews 1987 Hastings Center Rept at 40 n 12.

legislation, all forms of surrogacy agreements are considered unenforceable.<sup>353</sup> A surrogacy agreement is generally branded as a "commercial agreement" if the surrogate mother receives compensation over and above necessary expenses or where surrogacy brokers make large profits.<sup>354</sup>

### 10.3.3.3 REGULATION<sup>355</sup>

In several states proposed bills will regulate all forms of surrogacy. Some favour the "contract law model"<sup>356</sup> also referred to as the "streamlined approach", whereby the

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353 Thus the Louisiana legislation La Stat Ann par 9:2713 West (1987), which became effective on 01-09-1987 provides that: "(A) contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy". A surrogate motherhood contract is defined as: "(A)ny agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child". See Stern 1988 - 1989 J of Fam L 589 - 590; See also proposed bills in Connecticut (Conn H B 5398 Sec 1 (b) (Tulisano); Illinois Ill S B 499 (Barkhausen); North Carolina N C S B 305 (Johnson); N C H 1205 (Miller) and Rhode Island R I 87-S-386 (Carlin) cited by Andrews 1987 Hastings Center Rept 40 n 11.

354 See the discussion supra.

355 The different forms of regulating surrogate motherhood are discussed in chapter 6.

356 Rhode Island - RI Assembly 83 - H 6132 Jan sess (1983) and Alaska HR 498 12th Leg 1st Session (1981).

legality of the contract is recognised as well as compensation to the surrogate mother.<sup>357</sup> Automatic termination of the parental rights of the surrogate mother upon birth is provided for and sometimes also the subsequent adoption of the child by the commissioning couple.<sup>358</sup> A moderate regulatory approach, designed to establish the legal status of the child, to ensure informed consent and limit the possible abuses of the surrogacy practice, is provided for in the "moderate approach" or "informed consent model".<sup>359</sup>

#### 10.3.4 PROPOSED UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

With the exception of the proposed Uniform Status of Children of Assisted Conception Act drafted by the National Conference of Commissioners on Uniform State Laws,<sup>360</sup> little

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357 An example is the Arkansas legislation, discussed *supra*.

358 The Florida "pre-planned adoption" procedure discussed *supra* provides a good example of this model.

359 The California Bill Cal Assembly 1707 1985 - 1986 reg session (1985) which Tager "Surrogate Motherhood, Legal Dilemma" 1986 SALJ 381-404 at 403 recommended for South Africa, was based on this model. Other examples are Washington D C Council 6 - 152 (1985) and Michigan H B 4554 (1985) and HB 4555 (1985).

360 This document was approved and recommended for enactment in all the states at the Annual Conference 29 July - 5 August 1988 in Washington D C.

has been done by state legislatures to combine efforts regarding unification.

The Uniform Status of Children of Assisted Conception Act was designed primarily to regulate the status of children born by assisted conception and is child-oriented. The Committee is neutral on the issue of surrogacy and alternative legislative options regarding surrogacy, are provided for in the document. The procedure may either be judicially regulated or considered void. The proposed Act contains useful definitions of the "surrogate", "intended parents" "donor" and "assisted conception". The most important issues addressed in the proposed legislation are screening, informed consent, status of the child, and the option of obtaining approval by a court prior to entering into a surrogacy agreement.

#### 10.3.5 EVALUATION OF UNITED STATES LEGISLATIVE ACTIVITY

It is difficult to sum up the legislative position in the United States briefly because of the diversity of enacted and proposed legislation. It seems that most enacted and proposed legislation allow some forms of surrogacy - albeit under careful regulation and sometimes the careful scrutiny of a family court, similar to adoption applications. The Baby M case, as with the Baby Cotton case in Britain, unleashed considerable antagonism towards commercial or paid

surrogacy. The concern about "commercial surrogacy" is more pronounced in states where the courts have been confronted with surrogacy or related issues, for instance, Kentucky, Michigan, New York and New Jersey where "commercial surrogacy" is specifically prohibited. The Michigan legislation which forbids commercial surrogacy and is specifically opposed to "surrogacy brokers", provides a clear example of the legislature's concern about such practices. The \$50 000 (maximum) penalty contained in the Act is the highest yet in any surrogacy legislation.

Court decisions on surrogacy and related matters, have demonstrated the need for legislatures to take a stand on surrogacy issues. It should not be left to the courts to provide guidelines in this regard. The courts can, however, play an important role in approving the contract prior to insemination and determining whether the parties are adequately informed and have consented voluntarily.<sup>361</sup>

#### 10.4 ISRAEL

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<sup>361</sup> This is provided for in proposed bills in Illinois, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, and South Carolina and probably originated from the recommendations of the Ontario Law Reform Commission in their Report on Human Artificial Reproduction and Related Matters Vol II 281 - 285. See the discussion and recommendations in chapter 6.



Subsequent to the Baby M decision in the U S A, it was reported that Israel had outlawed surrogate motherhood. This step was taken by the Health Ministry on the grounds that "the practice was just unacceptable" and that it creates uncertainty regarding the parents of the child.<sup>362</sup>

#### 10.5 GERMANY

During April 1987 it was reported that Germany was preparing legislation to prohibit surrogate motherhood agreements.<sup>363</sup>

Towards the end of 1989, it was again announced that the legislature intended banning surrogacy in Germany.<sup>364</sup> In a discussion of this legislative prohibition of surrogacy in Germany,<sup>365</sup> important aspects were emphasised.

The prohibition applies to commercial surrogacy only.<sup>366</sup> The surrogate mother is considered the legal mother of the child and is under no obligation to hand the baby over to the

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362 Reported in 1987 American Medical News 23.

363 1987 Bulletin of Legal Developments 56.

364 Ad VermG 30 November 1989 in BGBI I S 2017 ff.

365 Liermann, Prof Dr S "Ersatzmutterschaft und das Verbot ihrer Vermittlung" 1990 MDR 857 - 863.

366 134 BGB; 1990 MDR 861.

intended parents after birth.<sup>367</sup> If she is willing to do so, the intended parents may adopt the child and such adoption, once approved by the court, is irrevocable.<sup>368</sup>

Commercial surrogacy agencies are prohibited from operating in Germany or from assisting childless couples to conclude agreements in other jurisdictions. Such agencies could face fines of up to DM50 000.<sup>369</sup>

During October 1990<sup>370</sup> it was again reported that the German Parliament was to enact legislation banning human embryo research, surrogate motherhood and posthumous artificial insemination. This Act,<sup>371</sup> described as the strictest yet, came into effect on 1 January 1991. The Act permits in vitro fertilisation only when the ova comes from the woman who is to have the baby. No criminal sanctions are imposed on the parties to a surrogacy arrangement, but medical

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367 1990 MDR 860.

368 1754 1755 BGB and 1752 B G B; 1990 MDR 861.

369 1990 MDR 863.

370 The Daily Telegraph 25-10-1990; Pretoria News 29-10-90.

371 Bundesgesetzblatt Jahrgang 1990 Teil 1 Gesets zum Schutz von Embryonen (Embryonenschutzgesetz - ESchG) 13-12-1990.

practitioners performing illegal in vitro fertilisations can face up to three years in jail.<sup>372</sup>

## 11 CONCLUDING NOTES

Although medical indications for utilising surrogate motherhood exist, this procedure of obtaining a baby contains a multitude of medical, legal, ethical and other problems. The experience in several countries has proved that commercial surrogacy, where large profits are made by the surrogate and third parties are regarded as being against public policy - an aspect which is dealt with in detail under public policy considerations (*boni mores*) in chapter 3.

There appears to be a tolerance towards surrogate motherhood in the absence of commercialisation and in the presence of a clear medical indication. The medical profession in both Britain and the United States seem hesitant as to the viability of the procedure and doctors who commit themselves, do so on their own conscience. In the absence of clear legislative guidelines, they are best advised to adhere strictly to guidelines provided by their individual societies or other representative bodies. It is clear that

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372 S 4.

more research is needed on psychological aspects affecting all the parties involved. The most important issues are so-called "bonding", psychological effects on the surrogate child in later life and on the other children of a married surrogate mother.

The courts, faced with surrogacy issues, have had a frustrating task in general, due to few available guidelines. The decisive criterion has been the welfare of the child and in most instances the courts have endeavored to give a fair and equitable decision. The courts have generally followed a casuistic approach and have decided each case on its merits.

Some countries such as Britain and Australia (Victoria) have hastily condemned commercial surrogacy as immoral by enacting legislation prohibiting such practices. In Victoria the parties to surrogate agreements even face criminal prosecution. This is not the case in Britain and Germany where the possibility of tainting the child with the criminal actions of the parents is acknowledged and avoided. This is commendable as the child is an innocent party and should not suffer for the actions of its parents. Unlike Britain and Australia, the U S states, have not hastily condemned surrogacy. The controversial Baby M case, has, however, rekindled the surrogacy debate and a number of

states have subsequently enacted legislation and many states are at present considering legislation.

It is unlikely that a total prohibition of surrogacy will be effective and it is preferable for legal systems to take on the challenge and provide adequate guidelines.

Specific legal aspects are considered in the next four chapters in an attempt to evaluate the possible ways of addressing the legal problems surrounding the practice of surrogate motherhood.

## CHAPTER 3 CONTRACTUAL AND DELICTUAL ASPECTS

## 1 INTRODUCTION

Surrogate motherhood involves consideration of several fields of both public and private law. In the private law sphere important issues are regulated by the law of contract as there is an agreement between the parties which may be embodied in a formal written contract. However, the enforceability of such a contract is at present still uncertain. The law of persons is particularly important when the legitimacy of a child is at issue or when aspects of parental power are involved. The law of delict is relevant when accountability for wrongful actions causing damage to a person arises, for instance when the wrongfulness of acts by medical practitioners or health-care workers has to be established.

In the sphere of public law, and specifically criminal law, the breach of statutory requirements may result in criminal liability. Several statutes, relevant to surrogate motherhood, such as the Human Tissue Act<sup>1</sup> and the Regulations<sup>2</sup> thereunder, the Registration of Marriages,

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1 63 of 1983.

2 No R 1182 No 10283 GG 20-06-1986.

Births and Deaths Act<sup>3</sup> and the Child Care Act<sup>4</sup>, contain penal provisions. Administrative law plays an important role in adoption proceedings, or where the court is called upon to act in its capacity as upper guardian in the assessment of parental power.

### 1.1 CONTRACTUAL ASPECTS

Two separate agreements are involved in surrogacy arrangements - one between the doctor(s) and the patient(s) based on a mandate, and one between the parties themselves. The doctor/patient relationship is discussed under delictual and criminal liability of medical practitioners in assisted reproduction.<sup>5</sup> In this chapter the discussion focuses on the agreement between the parties to the surrogacy arrangement.

Our legal system with its unique Roman-Dutch background, will not necessarily view the practice of surrogacy in the same light as many other jurisdictions, although there is undoubtedly much to be learnt from the history of surrogate

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3 81 of 1963.

4 74 of 1983.

5 The doctor-patient relationship is discussed in chapter 6.

motherhood practices in jurisdictions such as the United States of America and Britain.<sup>6</sup>

As the surrogacy agreement is affected by principles that form part of several legal fields, the most basic need for present purposes is to determine to what class or category of contract such agreements belong. If and when a South African court is called upon to decide a conflict of interests arising from a surrogacy arrangement, it will - in the absence of legislation - approach the issues on the basis of established common law principles. No doubt a court would also bear in mind the complexity presented by advances in modern-day birth technology.

The difficulty in applying "pure" contractual principles to surrogacy arrangements, has forced courts in other jurisdictions faced with problems arising from breach of a surrogacy contract, to treat the matter as a custody suit rather than applying the usual principles of the law of contract.<sup>7</sup> In so doing, the child's best interest was regarded as overriding the contract entered into by the

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6 As discussed in chapter 2.

7 See for instance *In Re a Baby* discussed in chapter 2.



parents and the surrogate mother.<sup>8</sup> Although the criterion of the child's best interest is undoubtedly of the utmost importance, it is submitted that ordinary principles of the law of contract also have a role to play in the settlement of disputes involving surrogacy arrangements.

Clark,<sup>9</sup> for instance, suggests the use of paternity suit settlement contracts in surrogacy agreements, as these settlement contracts are not a novelty to the legal system and may facilitate the decision of the courts in surrogacy cases.

Surrogacy agreements as we know them today, were entered into for the first time during the past decade or so. The complex issues which have arisen around these agreements in the past few years cannot at first glance be "slotted into" established legal categories. However, although it is perhaps convenient to classify any "new" or "different" social phenomenon which presents unique challenges to the legal system as *sui generis* and so open the door to creative lawmaking, South African courts have traditionally been

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8 See in general Clark N L "New Wine in Old Skins: Using Paternity Suit Settlements to Facilitate Surrogate Motherhood" 1986 - 1987 J Fam Law 483 - 527. See also the New York case *Matter of Adoption of Baby Girl* discussed in chapter 2.

9 1986 - 1987 J Fam Law 504.

reluctant to follow the path of judicial activism. The principles of *jus est dicere sed non dare* is still predominant in the minds of our judges. It is therefore necessary to endeavour to establish a sound theoretical basis for surrogacy agreements in our system. Should a surrogacy agreement be classified as a contract merely because it is usually contained in a written agreement signed by the parties, or is it merely a "gentleman's agreement" which is legally unenforceable?

In search of answers to these questions, one is compelled to revert to the roots of our law. As a surrogacy agreement is based on consensus between the parties, important aspects of the law of obligations, especially during the classical period, may prove helpful in the resolution of disputes arising from surrogacy agreements. In particular, light may be shed on the juristic nature of such agreements.

Although an in-depth examination of the law of obligations falls outside the scope of this work, aspects which could be relevant to the surrogacy agreement will be examined briefly. Having determined the nature of the agreement, the content will then be analysed in the light of these findings with due regard to statutory and other relevant considerations, and submissions will be made regarding the enforceability or otherwise of such agreements.

## 2 SOCIAL AGREEMENTS AND CONTRACTS

As the surrogacy agreement has, in legal literature, sometimes been referred to as a "gentleman's agreement", and therefore unenforceable, one must consider whether we are dealing with a *pactum* or *nudum pactum*. The phrases *ex nudo pacto non oritur actio*<sup>10</sup> and *ne ex pacto actio nascatur*<sup>11</sup> are not unknown to present-day South African law.<sup>12</sup>

The system of *pacta* in Roman and Roman-Dutch law is complex and only those aspects which may bear some relevance to surrogate motherhood agreements are discussed.

In Roman law agreements which could not be classified under contracts, were referred to as *pacta*. In early Roman law *pacta* were informal agreements for redemption from liability.<sup>13</sup> Initially these *pacta* were unenforceable and did not give rise to an action (*actio*). Later, however, some

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10 Ulpianus D 2 14 7 4. According to the translation by Van Zyl D H 1977 *Romeinse Privaatreg* 446, it means that when a cause (*causa*) is absent, it is clear that there can be no obligation: a mere agreement (*nuda pactio*) does not give rise to an action, although it provides an exception (*exceptio*) and according to C 2 3 10, no action can be maintained from a (mere) agreement.

11 Ulpianus D 2 14 7 5.

12 *Jajbhay v Cassim* 1939 AD 537 at 542. See also Van Zyl 1977 *Romeinse Privaatreg* 322 n 290.

13 See Dannenbring R 1980 *Roman Private Law* 199.

pacta were made actionable by the Praetor<sup>14</sup> - for instance the *pacta praetoria* - and others only by post-classical imperial legislation - for instance the *pacta legitima*.<sup>15</sup> In the time of Justinian<sup>16</sup> almost all forms of *pacta* were enforceable and actionable.<sup>17</sup>

In Roman-Dutch law, under the influence of Canon law, the *ex nudo pacto non oritur actio* principle was still recognised and a contract could only be enforced if the parties had a serious and deliberate intent to be legally bound.<sup>18</sup>

In present day South African law it is still a requirement for the formation of a contract that the transaction must be entered into seriously and deliberately with the intention

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14 The Praetor, an officer with wide powers in legal administration, was first appointed in 367 BC; see Van Zyl 1977 *Romeinse Privaatreg* 15 - 16. Although his powers were initially more limited, the Praetor peregrinus, appointed in 242 BC to deal with peregrini or foreigners "could use an equitable power, and frequently equitable fictions, to extend the narrow limits of the old civil law"; Sandars T C 1917 *The Institutes of Justinian* 11.

15 Dennenbring 1980 *Roman Private Law* 199.

16 Roman Emperor 527 - 565 AD who played an important role in the preservation of Roman law in the Eastern Empire.

17 Van Zyl 1977 *Romeinse Privaatreg* 322.

18 My emphasis. See Conradie v Rossouw 1919 AD 279 at 289 and the authorities cited. According to Voet the agreement must have been entered into *serio ac deliberato animo*.

to be legally bound.<sup>19</sup> Mere promises or social agreements, where this intention is absent, are not contracts. Kerr,<sup>20</sup> in confirming this requirement refers to the following quotation from Pothier:<sup>21</sup> "There are ... promises made with fairness and a real design of accomplishing them, but without any intention of giving the person to whom they are made a right of demanding their performance. This is the case where a person makes a promise, intimating at the same time that he does not mean to engage himself; or when such a reservation can be implied from the circumstances of the case, or the relative characters of the person making the promise, and the person to whom it is made."

Where a surrogate mother thus merely promises to carry a baby for the commissioning couple without the parties having the intention to be legally bound, there can be no valid contract. Should the parties, however, agree on the fundamental aspects of a surrogacy arrangement<sup>22</sup> and

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19 **Conradie v Rossouw** supra. Joubert D J 1987 **General Principles of the Law of Contract** 33 - 34; Lubbe G and Murray C 1988 **Farlam & Hathaway Contract** 237; Kerr A J 1982 **The Principles of the Law of Contract** 21 - 22.

20 1982 **Principles** 21 - 22.

21 The quotation is from the final paragraph of para 3 of his treatise on **Obligations**.

22 See the discussion infra under the Content of a Surrogacy Agreement and the Analysis of a Proposed Surrogate Mother Agreement Model in chapter 4.

thereafter, with the intention that a lawful obligation should be established, sign an agreement in which their intent is seriously and deliberately stated, it is not merely a "gentleman's agreement".

Unless the *causa* in such an agreement is, for instance, *iniusta*, *illicita*, *inhonesta* or *turpis*, (an aspect which is dealt with in greater detail under the discussion of the *boni mores*),<sup>23</sup> it is submitted that the agreement is binding.

It is further submitted that a surrogacy agreement cannot be classified as a *nudum pactum*. The mere fact that the enforceability of such contracts is not entirely beyond doubt at this stage, does not mean that there is no binding agreement. As discussed in the surrogate motherhood contract model,<sup>24</sup> the written contract should preferably contain a clause in which the parties unequivocally state their intent to be legally bound.

### 3 HISTORICAL PERSPECTIVE: CLASSIFICATION OF CONTRACTS IN ROMAN LAW AND THE APPLICABILITY THEREOF TO SURROGACY AGREEMENTS

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23 See the discussion *infra*.

24 See chapter 4.

The classification of contracts in Roman law depended largely on the manner in which the contract was concluded, for instance, *re, verbis, litteris and consensu contractae*.<sup>25</sup>

In this discussion the focus is on the so-called *consensu contractae* which, as a result of their consensual basis, may provide a familiar background to our understanding of the unique agreement between a commissioning couple and a surrogate mother and which, today, forms the basis of all contracts. The *consensu contractae*, which were enforceable *ex fide bona*,<sup>26</sup> include sale (*emptio venditio*), rent (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*). Moreover, these specific forms of contract today have the same requirements in South African law and are thus relevant to the present position.<sup>27</sup> Because surrogacy is often conceptualised as a form of rental, either of the body

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25 Dannenbring 1980 Roman Private Law 198 with reference to Gaius 3 89.

26 Although the binding effect of the consensual contracts rested solely on *fides*, they were later, in the early classical period, accepted in the *ius civile*. See Dannenbring 1980 Roman Private Law 198 - 199. On the aspect of *fides* in Roman law, see also Schulz F 1936 Principles of Roman Law 224 - 245.

27 See G 3 135; Inst 3 22 pr; Dannenbring 1980 Roman Private Law 198. See also Kahn E (ed) 1985 Contract and Mercantile Law Through the Cases 3 et seq, 9 et seq; De Wet J C and Van Wyk A H 1978 De Wet en Yeats - Die Suid-Afrikaanse Kontraktereg en Handelsreg 313 et seq, 278 et seq.

of the surrogate or of her services, the Roman law contract of lease, the *locatio conductio*, may provide a starting point for a possible classification. The mandate (*mandatum*) plays an important role in the doctor/patient relationship, but needs no further discussion in this section. A discussion of partnership (*societas*) similarly falls outside the scope of this discussion.

The generic *locatio conductio* of Roman law, was subdivided into *locatio conductio rei* (rental of a thing in *commercio*), *locatio conductio operis* and *locatio conductio operarum*. The *locatio conductio rei*, or rental of a thing in *commercio* is clearly inapplicable to the surrogacy arrangement and will not be further considered. However, the *locatio conductio operarum* or contract for services, and the *locatio conductio operis*, or contract for work are, it is submitted, not without possible relevance because they still exist in present day South African law.<sup>28</sup>

The distinction between a contract for services and a contract for work is not always easily ascertainable. Considering the *locatio conductio operis*, or contract for work, one finds that in these agreements compensation was

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28 Christie 1981 *Law of Contract* 510; Kahn (ed) 1985 *Contract and Mercantile Law Through the Cases* 9 et seq.



for the intended end-result of the agreement.<sup>29</sup> In the case of surrogacy, this would mean that compensation would be rendered to the surrogate mother for the end result of her work, ie, for the baby resulting from the agreement. As this comes dangerously close to the unacceptable concept of "baby buying" which is most certainly *contra bonos mores*, it is submitted that the *locatio conductio operis* is not a suitable bridge between our Roman law background and the present needs of a developing society. On the other hand, the *locatio conductio operarum* does not have this disadvantage. Although seldom used in a society in which the institution of slavery rendered it unlikely that a free man would find it necessary to offer his services to another<sup>30</sup>, this well-established agreement, when it was used, provided that any compensation due was for the services rendered and is still prevalent in South African law today.<sup>31</sup> Translated into present day surrogacy terms, this would in effect mean that the surrogate would be

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29 De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 339.

30 Van Oven J C 1948 *Leerboek van Romeinsch Privaatrecht* 279 - 280; Van Zyl 1977 *Romeinse Privaatreg* 302 n 205; Thomas Ph J 1980 *Essensialia van die Romeinse Reg* 129. See also Dannenbring 1980 *Roman Private Law* 223, who points out that although even professional services were rendered gratuitously, those who received the services thus rendered became morally obliged to make a presentation (*honorarium* or *salarium*) in return.

31 De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 338 et seq; Christie 1981 *Law of Contract* 510 - 511.

compensated for her services, ie, for carrying the baby to term and giving birth to it. The contract for services is consequently in this sense a contract for personal services, as amongst the most important undertakings by the surrogate mother are to act as a host mother - or as it has been expressed to "rent her womb"<sup>32</sup> for the full period of pregnancy - to give birth to the baby, and to relinquish whatever parental power she may have to the child.

An important point of difference between a surrogacy agreement and an ordinary contract for personal services, is the lack of control which a surrogate mother possesses over the performance of the entire contract, ie, the inability to stop the performance in the middle of the contract, the inability to control the quality of her performance and the inability to avoid emotional bonding between herself and the foetus.<sup>33</sup> Furthermore, surrogate mothers are often motivated by altruistic considerations<sup>34</sup> and compensation which was a

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32 See Sly K M "Baby-Sitting Consideration: Surrogate Mother's Right to "Rent her Womb" for a fee." 1982 - 1983 *Gonz L Rev* 539 - 565. This terminology is more appropriate in cases where the surrogate is merely a "carrier" or "host" mother and does not make any genetic contribution to the child - the so-called "full" surrogacy cases.

33 Cunningham K J "Surrogate Mother Contracts: Analysis of a Remedial Quagmire" 1988 *Emory L J* 721 - 753.

34 Parker Philip J "Motivation of Surrogate Mothers: Initial Findings" 1983 *Am J Psychiatry* 118. One must  
(Footnote Continued)

prerequisite for the traditional contract for services or sale is not necessarily present.<sup>35</sup>

In the light of these considerations, it would appear that the surrogacy agreement (explicitly as a contract for services), cannot comfortably fit into the mould of the Roman law agreements governing rent - *locatio conductio* - although there are some similarities.

Should the surrogate mother be compensated, surrogacy is sometimes also equated with the sale (*emptio*) of a child.<sup>36</sup> Briefly, the requirements for *emptio* and *venditio* in Roman law were consensus between the parties to buy and sell an object (*res* or *merx*) which had to be in *commercio* (of commercial value). The parties also had to reach consensus on the price (*pretium*). Although it was possible for a person to sell something which belonged to another, it was

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(Footnote Continued)

bear in mind that the data were collected in the USA where most surrogacy cases are commercial.

35 Van Zyl 1977 *Romeinse Privaatreg* 30.

36 Annas G J and Elias S "In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family" 1983 *Fam L Q* 221. See the British decision *A v C* (1987) 8 *Fam Law* 170 and 1984 *Fam Law* 241 C A where Comyn J considered the contract *contra bonos mores* and stated that "the purported contract (was) for the sale and purchase of a child". See also the dissenting opinion of Vance J in the USA in *Surrogate Parenting Associates v Kentucky* 704 S W 2d 209 (1986).

(and still is) impossible for someone to buy something which already belongs to him.<sup>37</sup> This principle still applies today.<sup>38</sup>

Although the buying and selling of slaves was common practice in the Roman Empire and during the time of the Republic, this practice has long been abolished and any contract resembling slavery undoubtedly contravenes public policy.<sup>39</sup> It is of course altogether unacceptable to regard a baby as an object of commercial value<sup>40</sup> and the equation of surrogate motherhood with "baby selling" shows a lack of understanding of the motivations and intent behind this agreement.

A second point for consideration is the relationship between a parent and child. Although children were considered to be the "possessions" of the paterfamilias in Roman law in the

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37 Thomas 1980 *Essentialia* 118; Van Zyl 1977 *Romeinse Privaatreg* 288 with reference to D 18 1 28 (Ulpianus libro quadragesimo primo ad Sabinum): *Rem alienam distrahere quem posse nulla dubitatio est; nam emptio est et venditio; sed res emptori auferri potest.*

38 *Cawcutt v Teperson and Saacks* 1916 CPD 406.

39 Christie 1981 *Law of Contract* 374 and the cases cited in n 212.

40 For a discussion of the commercial aspects of surrogate motherhood, see O'Brien S "Commercial Conceptions: A Breeding Ground for Surrogacy" 1986 *N C L Rev* 127 - 153.

sense that he could decide, for instance, whether to sell them, give them away in marriage, have them adopted or emancipated,<sup>41</sup> this is no longer the case. One can claim only parental power over a child. Spiro<sup>42</sup> defines parental power as "the sum total of rights and duties of parents in respect of minor children arising out of parentage". One of the most important rights is custody, while duties include support, but not "ownership" in the sense of absolute power over the child.

The question of "ownership" in a surrogate motherhood arrangement was specifically addressed by Sorkow J in the American state court trial when the Baby M case was first heard in New Jersey.<sup>43</sup> He stated that a person cannot purchase something which already belongs to him/her.<sup>44</sup> In casu the intended father was also the genetic father of the child. Not all decisions are equally clear, as is strikingly illustrated by the decision of the New Jersey Supreme Court in the Baby M case, which concluded that surrogacy involves either an impermissible "purchase" of a child, or payment

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41 See Spiro E 1985 Law of Parent and Child 1 and the references cited in n 1 and 42.

42 1985 Law of Parent and Child 36.

43 For a discussion of this case see chapters 2 and 5.

44 This is also the case in South Africa. See De Groot 3 14 9; Cawcutt v Teperson and Saacks supra.

for relinquishing parental rights to the child.<sup>45</sup> In the English decision *A v C*,<sup>46</sup> Comyn J, having found the contract *contra bonos mores*, stated baldly that "the purported contract (was) for the sale and purchase of a child".<sup>47</sup> In *Surrogate Parenting Assoc v Kentucky ex rel Armstrong*,<sup>48</sup> the Kentucky Supreme Court distinguished clearly between surrogate motherhood contracts and the buying and selling of children as prohibited by statute. According to the court the rationale of the prohibition on compensation for adoption is "to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child". The court further said: "In surrogate motherhood, the central fact of the procedure is that the agreement is entered into prior to conception on a voluntary basis and free from coercion." The court therefore found that the agency, Surrogate Parenting Association, did not operate in contravention of the statute which prohibits the sale or purchase of a child for adoption.<sup>49</sup>

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45 *Baby M* 109 N J at 437 - 438, 537 A 2d at 1248.

46 Discussed in chapter 2 under English Court Decisions.

47 At 457 of the report.

48 Discussed in chapter 2 under USA Court Decisions.

49 *Ibid.*

Despite the fact that opponents of surrogate motherhood are inclined to refer to the arrangement as the sale of a child, this must be disputed. From an analysis of sale (*emptio*) it seems clear that the surrogacy contract cannot be classified as a contract for the sale of a child.

From the historical analysis, it appears that surrogate motherhood agreements have more in common with lease (*locatio conductio*) than with sale (*emptio*). These *consensu contractae*, however, offer no satisfactory solution to the controversy surrounding the classification of the surrogacy agreement. Attention will therefore be turned to other forms of agreements which may bear some relevance to surrogate motherhood.

### 3.1 NATURAL OBLIGATIONS (*OBLIGATIONES NATURALES*)<sup>50</sup>

Although in form, natural obligations have the same characteristics as other obligations, for instance those emanating from a contract, there is one important difference: they are unenforceable or cannot be executed. Examples in Roman law are, for instance, an agreement between a *paterfamilias* and someone in his power and

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50 As opposed to civil obligations which are enforceable. See Joubert 1987 General Principles of the Law of Contract 12.

agreements concluded by the *filiusfamilias*.<sup>51</sup> This probably prompted Sandars to remark that natural obligations most probably always emanated from pacts (*pacta*).<sup>52</sup>

Natural obligations were known not only to Roman and Roman-Dutch law but also to South African law.<sup>53</sup> Although natural obligations are not enforceable as such, this does not imply that they are totally without legal force.<sup>54</sup> The law allows some effect, possibly because of the moral claim to recognition they involve.<sup>55</sup> The parties were bound by a tie which the jurists ascribed to the sphere of the *lex naturae* or *jus gentium*.<sup>56</sup> Sandars provides the example of a slave, who could not bind himself contractually. Should he be freed, however, he was bound by natural obligation and a

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- 51 For a more detailed description see Van Zyl 1977 *Romeinse Privaatreg* 249 and 249 n 7; Sandars 1917 *The Institutes of Justinian* 323.
  - 52 1917 *The Institutes of Justinian* 323.
  - 53 De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 1. Examples are gambling contracts.
  - 54 Sandars 1917 *The Institutes of Justinian* 323.
  - 55 Sandars 1917 *The Institutes of Justinian* 323. See also Lee R W and Honoré A M et al 1950 *The South African Law of Obligations* 170.
  - 56 The Romans divided their law in the *ius civile* which was only applicable to Roman citizens and the *ius honorarium* which was applicable to citizens and non-citizens. Sandars 1917 *The Institutes of Justinian* 323 with reference to D 1 17 84 1 in this regard: "*Is natura debet quem jure gentium dare oportet, cujus fidem secuti sumus.*"



suretyship could be created to give effect to such an obligation. In Van Oyen's<sup>57</sup> opinion natural obligations have always played an important role in the history of private law. Their equitable characteristics help to alleviate the sometimes harsh results of the application of "strict law" and in the grey area between law and morals, they help to satisfy our sense of justice, especially in a changing society. As a general rule performance rendered could not be reclaimed, but the claim could be raised by set-off.

Joubert<sup>58</sup> points out that, with the exception of common-law wagers, natural obligations in present day South African law "is something of a rarity". He, however, explains that the term "natural obligation" is used to describe cases where a normal obligation does not come into existence, as a result of the absence of a specific requirement for liability. It is then sometimes argued that a moral obligation arises. The term also refers to duties which cannot be enforced in the normal way, ie for which no remedies such as specific performance or damages exists. The obligation, however retains the characteristic of a duty, which cannot be enforced.<sup>59</sup> Joubert further indicates that there have been

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57 1942 *Levensboek van Romeinsch Privaatrecht* 385.

58 1957 *General Principles of the Law of Contract* 14 - 15.

59 *Ibid*

attempts to extend the term to cases where a statutory provision makes the contract unenforceable, but a more equitable solution would be to provide some relief to the party who has suffered harm. This extension is, according to him, not universally recognised.<sup>60</sup>

A modern day example of a natural obligation is found in the decision of *Allison v Massel and Massel*.<sup>61</sup> In casu an agreement was concluded between a client and his attorney, whereby the latter agreed to represent the former for an amount agreed upon, but a bill of costs had not been taxed. The court found the agreement to be a natural obligation, with the result that the attorney may not sue for his fees until a bill of costs had been taxed. The debt cannot be recovered by action such as the *condictio indebiti*, but a set-off between the debt owed to each other was still possible.

### 3.2 INNOMINATE CONTRACTS

Innominate contracts also form a complex system in Roman law and cannot be dealt with adequately within the scope of this discussion. There are, however, some characteristics, which

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60 Ibid.

61 1954 4 SA 560 T.

also apply to surrogacy arrangements which will be discussed.

Contracts which fell outside the sphere of the recognised forms of contract such as sale and locatio conductio, were termed innominate contracts.<sup>62</sup> The contract came into existence by a thing having been done or given by one party, who then expected the other to perform.<sup>63</sup> Although such agreements were, strictly speaking, not contracts, the Praetor would, if one of the parties had already performed in terms of the agreement, force the other party to do so as well. These were referred to as actiones in factum.<sup>64</sup>

Innominate contracts in the meaning explained above have little significance in our present day legal system since all contracts are consensual. There is, however, one

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62 For a discussion of innominate contracts see Sandars 1917 *The Institutes of Justinian* 322; Van Zyl 1977 *Romeinse Privaatreg* 321; Dannenbring 1980 *Roman Private Law* 200.

63 See Paulus D 19 5 5 pr (Paulus libro quinto quaestionum): describes it as follows: "... aut do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias" - I give something to you so that you must give something to me, or I give so that you are bound to do something for me, or I do something for you so that you are bound to give me something or I do something for you so that you are bound to do something for me.

64 For a more detailed discussion see Van Zyl 1977 *Romeinse Privaatreg* 322; Sandars 1917 *The Institutes of Justinian* 322.

important analogy between innominate contracts and surrogacy agreements. Neither is a standard form of contract, as they fall outside the sphere of recognised contracts. In this wide sense of the word, surrogacy can be regarded as a modern day innominate contract.

#### 4 THE CONTENT OF A SURROGACY AGREEMENT<sup>65</sup>

In a basic surrogacy agreement, the surrogate mother agrees to undergo artificial insemination either by AID<sup>66</sup> with sperm from the commissioning husband or, in full surrogacy, by transfer of the embryo resulting from in vitro fertilisation to her uterus. She agrees to carry the baby to full term and to relinquish all parental rights after the birth of the child. In partial surrogacy, the commissioning husband agrees to the insemination of the surrogate with his sperm, to be identified as the genetic father at birth, to accept financial responsibility for the child, and to take custody of the baby at birth.<sup>67</sup> Beyond the basic agreement,

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65 The full content of a surrogacy agreement is discussed in chapter 4.

66 Artificial insemination with donor sperm.

67 Greenberg L J and Hirsh H L "Surrogate Motherhood and Artificial Insemination: Contractual Implications" 1982 Med Trial Tech Q 153.

additional terms may be agreed upon and included in the written contract.<sup>68</sup>

The intent in a surrogacy agreement is unique, and although surrogate motherhood contracts have characteristics in common with some well-known specific contracts such as *locatio conductio operarum* or contract for services, it is submitted that the surrogacy agreement is an agreement *sui generis* for the reasons already discussed and should be treated as such. Having reached this conclusion, the legality of the agreement must be considered.

#### 4.1 REQUIREMENTS FOR THE VALIDITY OF CONTRACTS

If an agreement is to be of legal force and effect as a contract the requirements laid down by law must be met. The parties must have the legal capacity to contract, the object of the agreement must be physically possible and must be legally possible, ie must not be prohibited by law.

Requirements regarding contractual formalities need not be discussed in depth, since, with the exception of hire-purchase contracts, sales of land and contracts of suretyship, no formalities are required for the conclusion

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<sup>68</sup> See the details in the discussion of the Terms of the Contract in chapter 4.

of contracts.<sup>69</sup> Where the parties themselves have laid down rules for future conduct in a written contract, these must be adhered to.<sup>70</sup>

Regarding the requirement of physical possibility, it should not provide an obstacle in surrogacy agreements, but it is strongly advised that surrogacy should only be made available to adult, married persons over the age of 21 and for whom there are no other alternatives of having a child. A surrogate mother who offers her services to a commissioning couple, should herself not be infertile or physically incapable of undertaking the pregnancy and delivery of the child.

The requirement of legality, however, provides an obstacle and needs to be fully discussed.

#### 4.2           LEGALITY

A requirement for the validity of all contracts, is that the conclusion of the contract and object or purpose of the

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69   Kerr 1982 Principles 135 and n 271, 272 and 273.

70   Kerr 1982 Principles 96 - 97 and 141.

contract must not be contrary to a legal rule, whether contained in a statute or common law.<sup>71</sup>

A surrogacy agreement will only be valid and enforceable if it does not contravene an Act of Parliament or other statutory provision, and is not considered as *contra bonos mores*.<sup>72</sup> Although the contract itself may not be illegal in the sense that it is not concluded in contravention of a statutory provision, some writers are of the opinion that it is immoral *per se* or *contra bonos mores* and therefore null and void.<sup>73</sup> This is specifically the case in commercial surrogacy agreements. Others argue<sup>74</sup> that it may not be illegal but merely unenforceable.

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71 This is sometimes comprised within the so-called *iusta causa* requirement. Joubert 1987 *General Principles of the Law of Contract* 129. See also *Conradie v Rossouw* supra 279; *Kennedy v Steenkamp* 1936 CPD 17; *Froman v Robertson* 1971 1 SA 115 A; *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 A.

72 1978 De Wet and Van Wyk *Kontraktereg en Handelsreg* 80; Christie 1981 *Law of Contract* 373.

73 O'Brien S 1986 *N C L Rev* 127 at 148; Sappideen C "The Surrogate Mother - A Growing Problem" 1983 *U New S Wales L J* 90.

74 Furrow B R "Surrogate Motherhood: A New Option for Parenting?" 1984 *Law, Med & Health Care* 112; Erickson E A "Contracts to Bear a Child" 1978 *Cal L Rev* 621 - 622; Mady T M "Surrogate Mothers: The Legal Issues" 1981 *Am J L & Med* 345.

A complex question in surrogacy agreements is whether the agreement is "a good and legitimate one, and not one contrary to law or morality or public policy".<sup>75</sup>

Furthermore, it must be established whether surrogate motherhood arrangements conflict with any existing statutory enactments.

Attention must consequently be given, first, to an evaluation of the *boni mores* and, secondly, to legislation presently affecting surrogacy agreements.

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75    *Rood v Wallach* 1904 TS 187 212; *Froman v Robertson*  
      *supra* at 120 H.



#### 4.2.1 PUBLIC POLICY AND BONI MORES

The *boni mores* principle was acknowledged in Roman law<sup>76</sup> and is also recognised in modern Dutch law, which recognises that a contract is void if statutory requirements are not complied with or if its purpose is immoral or the public order is contravened.<sup>77</sup> Similarly, a contract contravening legislation or public policy is invalid and unenforceable in English law.<sup>78</sup> The harmful tendency must be clear and the injury to the public must be a probable and not merely a possible consequence.<sup>79</sup> The same principles apply in South African law.<sup>80</sup>

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76 *Pacta quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere indubitati juris est.* C 2 3 6 (Imp Antoninus); Van Zyl 1977 *Romeinse Privaatreg* 253 n 19.

77 Art 1373 B W (strijdig met die goede zeden of openbare orde); Rutten L E H C Asser's 1975 *Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht: Algemene Leer der Overeenkomsten* 180.

78 Treitel G H 1979 *The Law of Contract* 32.

79 Treitel 1979 *The Law of Contract* 32 n 80 citing *Fender v St John Mildmay* (1938) AC 1 13.

80 1978 *De Wet and Van Wyk Kontraktereg en Handelsreg* 80; Christie 1981 *Law of Contract* 373; Kerr 1982 *Principles* 99 et seq.

## 4.2.2 MEANING OF THE BONI MORES IN SOUTH AFRICAN LAW

### 4.2.2.1 GENERAL REMARKS

The concept of the *boni mores* is a very wide one reflecting the juristic convictions of the community. It is founded on ethical, moral and social perceptions and differs from community to community, from country to country, and from time to time. In countries like South Africa with heterogeneous populations, it is often difficult to generalise on the precise content of prevailing societal perceptions although broad consensus can be identified in certain instances.<sup>81</sup>

### 4.2.3 THE BONI MORES - LAW OF CONTRACTS<sup>82</sup>

In deciding whether a contract is illegal it is usually accepted that this is the case where it is contrary to public policy or *contra bonos mores*.<sup>83</sup> Although it has been argued that the former concept has a wider meaning than the

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81 See Strauss S A and Strydom M J 1967 *Die Suid-Afrikaanse Geneeskundige Reg* 185.

82 See in general Lubbe G "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" 1990 *Stell L R* 7 - 25.

83 For a discussion of this aspect see Joubert 1987 *General Principles of the Law of Contract* 132 - 133; Lubbe and Murray 1988 *Farlam & Hathaway Contract* 240.

latter, the concepts are utilised interchangeably in this thesis.

It is a general principle of the law of contracts that all agreements seriously entered into are to be enforced by the courts, unless they are against public policy or good morals.<sup>84</sup> Although the court is empowered with a discretion in this regard, it should be exercised with caution and utilised only if the "harm to the public is substantially incontestable".<sup>85</sup>

The boundaries of what is contrary to public policy have never been expressly delineated. Over the years, the courts have established categories of such contracts by means of judicial precedent.<sup>86</sup> There is, however, not a numerus

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84 Christie 1981 Law of Contract 375 with reference to a dictum by Innes J in *Eastwood v Shepstone* 1902 TS 294 at 302; Kerr 1982 Principles 118; *Edouard v Administrator*, Natal 1989 2 SA 368 D & CLD at 378 I - J.

85 Christie 1981 Law of Contract with reference to Williamson A J's judgment in *Kuhn v Karp* 1948 4 SA 825 T at 838 - 840. Aquilius "Immorality and Illegality in Contract" 1941 SALJ 346 is of the opinion that (a) contract against public policy is one stipulating a performance which is not per se illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community"; *Edouard v Administrator Natal* supra 378 J - 379 C.

86 Kerr 1982 Principles 98 et seq; Christie 1981 Law of Contract 341 et seq; Joubert 1987 General Principles of the Law of Contract 132 et seq.

clausus of contracts which may be considered against public policy.<sup>87</sup> Included in established categories are, inter alia contracts encouraging crime, delict and other unlawful acts and contracts injurious to the institution of marriage.<sup>88</sup> Whether surrogacy agreements fall into any of these categories is considered infra.

#### 4.2.4 THE BONI MORES - LAW OF DELICT AND CRIMINAL LAW

The boni mores criterion is utilised in the law of delict<sup>89</sup> and criminal law to determine the wrongfulness of an act.<sup>90</sup>

Although a single act may constitute a delict as well as a crime, it is not necessarily the case and one may therefore assume that the application of the boni mores criterion will differ in these fields.<sup>91</sup>

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87 Magna Alloys & Research (SA) (Pty) Ltd 1984 4 SA 874 A 891.

88 Christie 1981 Law of Contract 347 et seq; Lubbe and Murray 1988 Farlam and Hathaway Contract 236 et seq.

89 See in general Neethling, Potgieter and Visser 1990 Law of Delict 31 et seq.

90 Snyman C R 1986 Strafreg 99.

91 Neethling, Potgieter and Visser 1990 Law of Delict 34 n 27 with reference to Strauss S A 1961 Toestemming tot Benadeling as Verweer in die Strafreg en die Deliktereg LLD Unisa 1961; Van der Merwe N J and Olivier P J J 1989 Die Onregmatige Daad in die Suid-Afrikaanse Reg 49 - 51.

In adjudicating legal conflicts resulting in civil suits or criminal prosecutions, it is the task of the court to interpret what the convictions of society are in relation to the issue before it.

An act is wrongful in the law of delict if a legally recognised interest has been factually infringed in a legally reprehensible or unreasonable manner - there must thus be factual infringement coupled with violation of a legal norm.<sup>92</sup> The general norm or criterion which is used to determine whether the infringement is unlawful is the legal convictions of the community - the *boni mores*.<sup>93</sup>

On the strength of Roman law,<sup>94</sup> Joubert<sup>95</sup> states that the *boni mores* concept in the law of delict - specifically *injuria* - does not refer to "goeie sedes" (good morals)<sup>96</sup> as such, but rather to "die gemeenskap se opvattinge aangaande wat behoorlik is" (society's notions as to what is proper).<sup>97</sup>

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92 Neethling, Potgieter and Visser 1990 Law of Delict 29.

93 Neethling, Potgieter and Visser 1990 Law of Delict 31 - 32.

94 D 47 10 15 6.

95 1953 Grondslae van die Persoonlikheidsreg 109.

96 My translation.

97 My translation.

It is said that in utilising the *boni mores* as a delictual criterion for wrongfulness, it is not important what the community regards as socially, morally, ethically or religiously right or wrong, but rather whether or not the community regards the act as delictually wrong.<sup>98</sup> It is thus a legal criterion.<sup>99</sup> This view is supported by several writers.<sup>100</sup>

The courts have adopted the *boni mores* or general reasonableness criterion on a number of occasions as a juridical yardstick<sup>101</sup> which gives expression to the prevailing convictions of the community regarding right and wrong. Thus it was stated in *O'Keeffe v Argus Printing and Publishing Co Ltd*:<sup>102</sup> "Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of

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98 Neethling, Potgieter and Visser 1990 *Law of Delict* 34 with reference to Strauss 1961 *Toestemming* 422; Van der Walt 1979 *Delict* 23 n 9, who acknowledges that the legal convictions are influenced by ethical, moral and legal convictions.

99 My emphasis.

100 Neethling 1985 *Persoonlikheidsreg* 66; Van der Walt J C 1979 *Delict: Principles and Cases* 22 - 23; Boberg P Q R 1989 *The Law of Delict Vol I Aquilian Liability* 33 et seq; Van der Merwe and Olivier 1989 *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 58 et seq.

101 My emphasis.

102 1954 3 SA 244 C.

thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society,<sup>103</sup> and the question must to a great extent therefore be left to the discretion of the court where an action on account of the alleged injury is brought."

The *boni mores* as a criterion for reasonableness has been utilised in several court decisions.<sup>104</sup> The advantage of this criterion is that it is flexible. It enables the court to adapt the law to reflect the changing values and needs of the community. Thus it was stated in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*:<sup>105</sup> "Deur die maatstaf van die 'regsoortuiging van die gemeenskap' ... toe te pas, verkry die regstelsel die voordeel van die wisselwerking tussen die ethos en geregtelike voorbeeld, en 'n soepelheid wat by meer presedentgebonde stelsels ontbreek."

In the well-known case *Minister van Polisie v Ewels*<sup>106</sup> which dealt with delictual liability for an omission or failure to

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103 My emphasis.

104 For a list of cases on this aspect, see Neethling, Potgieter and Visser 1990 *Law of Delict* 31 - 32 n 17.

105 1977 4 SA 376 T at 387.

106 1975 3 SA 590 AD.

act, reference was also made to the juristic convictions of the community. It was held that an omission to act is wrongful and actionable when, in the circumstances, the omission is not merely one which gives rise to moral indignation, but one which is required, in accordance with the juristic convictions of the community, to be regarded as a wrongful omission for which the person who failed to act should be liable in damages.<sup>107</sup> The determination of the juristic convictions of the community is not an easy task for a court. Boberg<sup>108</sup> with reference to the *Ewels* case, concluded that the legal conscience of the community is but a thin veil covering the naked truth that judges will apply their personal view on the question whether a particular omission ought to support a claim or not. Boberg's view is supported in another discussion of the *Ewels's* case,<sup>109</sup> in which the writer expresses doubts as to whether the community has any legal convictions, as opposed to moral ones. He continues to state that if such convictions do exist, they are not easily determined. Strauss and Strydom<sup>110</sup> express an opposing view. According to them, judges are, in fact, well equipped to determine the

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107 597 A - B.

108 "The Wrongfulness of an Omission" 1975 SALJ 361.

109 *Amicus Curiae* "The Actionable Omission - Another View of *Ewels's* Case" 1967 SALJ 85.

110 1967 Suid-Afrikaanse Geneeskundige Reg 185.



(juristic) convictions of society as they are daily confronted with different kinds of human relationships and conflicting interests.

Although the *boni mores* criterion undoubtedly plays a crucial role in determining wrongfulness in the law of delict, the *boni mores* or reasonableness criterion is not the only criterion utilised in practice. Thus Van der Walt<sup>111</sup> states that it is unnecessary to apply it in every case, especially where other common law and statutory norms apply, ie grounds of justification or statutory authority. It is basically reserved for application and the provision of guidance in borderline and novel situations. It is applied as a supplementary test for wrongfulness where:

- (i) there is no clear legal norm or ground of justification and
- (ii) for purposes of refinement, ie to distinguish between right and wrong in borderline cases.<sup>112</sup>

The applicability of the *boni mores* as a criterion for wrongfulness is considered infra under specific delictual actions.

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111 1979 Delict 22; See also Neethling, Potgieter and Visser 1990 Law of Delict 33 et seq.

112 1990 Neethling, Potgieter and Visser Law of Delict 38.

#### 4.2.5 THE BONI MORES - AN AFRICAN PERSPECTIVE

For the sake of interest it may be mentioned that in some African tribes,<sup>113</sup> the so-called "seed-raisers" are recognised to ensure a male heir for the "kraalhead".<sup>114</sup> The "seed-raiser" plays the role of an auxiliary wife to the kraalhead under certain circumstances, such as the inability of the "main wife" to bear children, or if she dies without having borne a son. Amongst the Sotho-Tswana group, the "kraalhead" may acquire a *sehantlo* wife, who he marries for the express purpose of raising seed where the "main wife" is unable to produce an heir.<sup>115</sup> Similar practices are recognised amongst the Venda<sup>116</sup> and the Tsonga.<sup>117</sup>

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113 This is for instance the case amongst the Zulu and Swazi, see Seymour S M 1970 *Bantu Law in South Africa* 260 and the authorities cited in n 39.

114 Seymore 1970 *Bantu Law in South Africa* 258 - 262.

115 Seymour 1970 *Bantu Law in South Africa* 261.

116 Ibid.

117 Seymour 1970 *Bantu Law in South Africa* 262.

#### 4.2.6 THE BONI MORES AND SURROGATE MOTHERHOOD

As the criterion of the boni mores is general and assessment may be difficult to make, differences of opinion may be expected.<sup>118</sup> In the case of surrogate motherhood there is certainly no unanimity as to whether such an agreement conflicts with the juristic convictions of the community and whether it should be considered against public policy.

The churches in South Africa have taken a cautious but mostly negative stance towards surrogate motherhood, because of the involvement of third parties in the procedure.<sup>119</sup> The birth of the Tzaneen triplets in 1987 sparked a controversy amongst church leaders, medical practitioners and other interested groups. It was reported<sup>120</sup> that those absolutely opposed to surrogacy included the Roman Catholic Church,<sup>121</sup> Muslim and Hindu leaders, the National Council for Child and Family Welfare and the Medical Association of South Africa.

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118 See Strauss and Strydom 1967 Suid-Afrikaanse Geneeskundige Reg 185.

119 De Bruyn P J "Surrogaatmoederskap: 'n Teologies-Etiese Beoordeling" 1991 Instituut vir Reformatoriese Studies (Potchefstroom); "Kunsmatige Voortplanting vanuit Etiese en Juridiese Hoek Bekyk" 1986 Instituut vir Reformatoriese Studies (Potchefstroom)

120 Sunday Times 12-04-1987.

121 Although the Tzaneen triplets were baptised and accepted into the Catholic Church. See the report in Beeld 04-01-1988.

The In Vitro Support Group, an organisation consisting of childless couples were in favour of the procedure. Some leaders of the Dutch Reformed Church were not opposed to the Tzaneen case as it was a family arrangement,<sup>122</sup> whereas others condemned the entire procedure.<sup>123</sup> In a recent sensitive article,<sup>124</sup> a prominent theologian stated that there should be no objections to "full" surrogacy, where a family member or friend is willing to carry a foetus for a childless couple. Commercial surrogacy and the use of donor gametes remain, according to him, unacceptable.

In its statement,<sup>125</sup> the Federal Council of the Medical Association of South Africa concluded after a meeting held during May 1986, that surrogate motherhood was undesirable. Apparently the decision was taken on the strength of information and views requested and received from the legal, social welfare professions and theologians. A broad consensus, however, seems to exist in legal circles that

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122 See the statements by Prof Johan Heyns in Beeld 09-04-1987 and Beeld 22-11-1988; Dr Willie Botha in Die Kerkbode 15-04-1987 and Die Vaderland 23-04-1987. See also the Sunday Times 12-04-1987.

123 Prof Danie du Toit of Stellenbosch Theological Faculty was specifically opposed to assisted conception with gametes from third parties. See Die Vaderland 23-04-87.

124 Prof H Pieterse (Department of Practical Theology at Unisa) "Surro-ma's en My Gewete" in 1991 Die Voorligter 26 - 27.

125 MASA dated 08-04-1987 ref 709 468.

only commercial surrogacy is undesirable.<sup>126</sup> As I shall endeavour to prove, there seems to be no reason to conclude that all forms of surrogate motherhood are undesirable.<sup>127</sup>

An analysis of the proposed surrogacy legislation in the USA,<sup>128</sup> shows the range of societal attitudes prevailing in that country. While surrogate motherhood is accepted in a number of American states, it is limited to non-commercial surrogacy in certain states.<sup>129</sup> Commercial surrogacy is statutorily outlawed in Britain, Germany, some states of the USA and in the state of Victoria, Australia, where it at present constitutes a criminal offence.<sup>130</sup>

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126 Strauss S A in 1982 *Die Proefbuisbaba* Pieterse (ed) 21; Strauss S A "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *Intern Legal Prac* 71. Lupton M L "Surrogate Motherhood: The Advantages and Disadvantages" 1968 *TRW* 151 - 152; Lupton M L "The Right to be Born: Surrogacy and the Legal Control of Human Fertility" 1988 *DJ* 44; Tager L "Surrogate Motherhood, Legal Dilemma" 1986 *SALJ* 402 - 404; Pretorius R "A Comparative Overview and Analysis of A Proposed Surrogate Mother Agreement Model" 1987 *CILSA* 275; but see Schutte M *Die Hervorming van die Regsposisie van Buite-Egtelike Kinders met Besondere Verwysing na die Status van Kinders deur Kunsmatige Bevrugting* Verwek LLD Unisa 1986 298 and Van der Walt A J *Instituut vir Reformatoriese Studies* 1988 29.

127 See chapter 7.

128 See chapter 2.

129 For instance in Kentucky, Michigan and Nebraska 1990 *Surrogate Motherhood* Gostin (ed) Appendix II.

130 See chapter 2.

The boni mores are also particularly relevant when questions of "trading in babies" arise. There is no doubt that the notion that a person can be treated as a chattel that can be bought and sold, conflicts with the boni mores of most societies. Likewise there is a conflict with the boni mores when needy persons are exploited or undue restraints are placed upon human conduct and liberty. Agreements to interfere with the natural bond between parent and child and the random transfer of parental power may also be considered contra bonos mores, as may agreements to interrupt the relationship between husband and wife. For instance, a promise of marriage when one of the parties is already married at the time of the proposal is null and void. Similarly, contracts to interfere with or terminate the marriage relationship would be void. Most surrogacy agreements contain an undertaking by the surrogate mother to refrain from sexual intercourse with her husband two weeks prior to the artificial insemination with donor semen as well as the two weeks following the insemination.<sup>131</sup> This term is included to ensure that the child conceived is that of the donor and not of the husband of the surrogate. On account of the personal nature of this term, enforcement is practically impossible. It is nevertheless submitted that should the commissioning father be able to prove that the

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131 See the Proposed Contract in chapter 4.

child is not his genetic child, the parental rights will vest in the surrogate and her husband as the child will not have been conceived as a result of artificial insemination and they will, in all respects, be the genetic parents of the child. Most medical practitioners performing artificial insemination or in vitro fertilisation, also advise their patients to refrain from sexual intercourse for a certain period as it may result in failure of the procedure.

The question to be answered is whether in South Africa, surrogate motherhood agreements should be regarded as violating the *boni mores*. Is a *turpis causa* not perhaps present in such an agreement? Are such agreements not perhaps immoral or ethically repugnant? There are obviously no easy answers to these questions and a careful analysis of each aspect of the agreement is required. The most problematic areas are probably compensation of the surrogate mother for her services and the agreement to transfer parental power. Each of these is discussed separately.

#### **4.2.6.1    COMPENSATION OF THE SURROGATE MOTHER**

The question whether the surrogate mother should be compensated for her services, is central to the question of whether the agreement should be regarded as *contra bonos mores* or against public policy.

A clear distinction should be drawn between commercial and altruistic surrogacy. In the latter case, the surrogate mother acts purely from altruistic motives and the profit motive is wholly lacking. There is little doubt that our courts will regard the so-called "commercial surrogate motherhood", where large amounts of money are involved, as repugnant and immoral.<sup>132</sup> The involvement of so-called "surrogacy brokers" who make large profits in the process is also totally unacceptable.<sup>133</sup> How should altruistic surrogacy or compensation of the surrogate mother for necessary expenses be viewed?

The line between commercial and non-commercial or altruistic surrogacy is not always well defined. Does compensation for medical and maternity costs qualify as commercial surrogate motherhood? It is submitted that this is not the case, as was recently demonstrated by the first case of its kind in *In re Adoption Application (payment for adoption)*<sup>134</sup> in England. Latey J allowed the adoption of a surrogate baby by the "commissioning" parents, despite "compensation for loss

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132 Strauss in 1982 *Die Proefbuisbaba Pieterse* (ed) 21; Lupton 1986 TR 151 - 152.

133 In a interview during May 1989 with the controversial attorney Noel Keane, who initiated surrogate motherhood contracts in Michigan in the United States, it was established that Mr Keane is paid approximately \$10 000 for each contract.

134 3 WLR (Family Division) 1987.



of wages and expenses during pregnancy". The court held that there had been no commercial transaction<sup>135</sup> and therefore that payments made did not contravene s 50(1)(3) of the Adoption Act of 1958 (as amended). If the payments had been made as a reward for placing a child for adoption, the court found that it had jurisdiction subsequently to authorise those payments and would do so since an adoption order was in the child's best interest. Latey J concluded<sup>136</sup> that if the section were to be interpreted as an absolute prohibition against adoption, "it would mean, for example, that any payment, however modest and however innocently made, would bar an adoption and do so however much the welfare of the child cried aloud for adoption with all the security and legal rights and status it carried with it: and that, be it said, within the framework of legislation whose first concern is promoting the welfare of the children concerned".

In an *obiter dictum* the judge remarked that surrogacy arrangements are not against the law as it stands.<sup>137</sup> He concluded with the following statement: "One cannot sit in

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135 In this instance the parties concluded a private arrangement and the baby was born as a result of sexual intercourse between the "commissioning" father and the surrogate mother.

136 At 36 D.

137 At 37 F.

these courts and hear all the multitude of professionals and others without knowing well the depth of longing in couples, devoted to each other, who cannot have a child through no fault of their own, but before they go down the path of surrogacy they should know and know fully what it may entail. It is not a primrose path."

It is a well-established that society in general considers having children necessary and desirable. Even where many modern societies actively encourage family planning to combat overpopulation by limiting the size of families,<sup>138</sup> the right to have a child of one's own is still highly regarded and respected. It is submitted that rather than over-reacting to surrogacy agreements and viewing a surrogate mother and/or a commissioning couple as people who pose a threat to the moral standards of the community, the issue should be viewed with greater sensitivity. As Latey J stated, there are certainly pitfalls that couples should be made aware of. However, those opposed to surrogacy should not try to prevent others from utilising this option. A lack of sensitivity - it must regrettably be noted - is to be

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138 See the dictum by Thirion J in *Edouard v Administrator, Natal* supra at 376 A where it is stated that: "The state is conducting a campaign of family planning, the aim of which is to curb the growth of the population. It is in the interests of society that the size of a family should not exceed the limit beyond which it would not be possible for it to maintain a reasonable standard of living."

detected in the suggestion inherent in a question posed by a South African jurist: "Die vraag is of 'n persoon wat nie in staat is om onvrugbaarheid te verwerk nie, 'n ouer behoort te kan word?"<sup>139</sup>

It is submitted that surrogacy agreements, even where the surrogate mother is compensated for expenses, should not be branded as immoral provided they are properly regulated by law. How this regulation should be achieved is set out below.<sup>140</sup>

#### 4.2.6.2 AN AGREEMENT TO TRANSFER PARENTAL POWER<sup>141</sup>

As a general rule, an agreement to transfer or delegate parental power permanently is invalid as being *contra bonos mores*, and will not be enforceable.<sup>142</sup> Parental power may however, be transferred or delegated by way of adoption and upon divorce or in special circumstances, by a court order. The court, in its capacity as upper guardian of all minors, has the power to deprive a parent of all, or specific incidents of, parental power if it is considered as being in

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139 Schutte 1986 *Hervorming* 298.

140 See the Recommendation in chapter 7.

141 See also chapter 5 under the Law of Persons.

142 See in general Spiro 1985 *Law of Parent and Child* 43 - 45.

the best interest of the child to do so.<sup>143</sup> In *Ex parte Van Dam*<sup>144</sup> an agreement to transfer custody of an illegitimate child from the mother to the biological father was, for instance, allowed because it was held to be in the best interest of the child.

The common law rule that an agreement to transfer parental power is *contra bonos mores* became part of our law long before anyone could possibly have anticipated that procreation technology would become so advanced that in some instances at least five people could claim parental rights to one child. Moreover, it seems anomalous to allow a woman to consent to adoption when she is pregnant with an unwanted child, but not allow the same for the surrogate mother.

It seems clear that the *boni mores* is a dynamic concept that can be used to justify different conclusions, depending on

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143 Spiro 1985 *Law of Parent and Child*. *Calitz v Calitz* 1939 AD 56 at 63 and 64; *Goodrich v Botha and Another* 1952 4 SA 175 T 180 F where Roper J states: "It is clear that in South Africa the upper guardianship once exercised by the Courts of Holland is vested in the Supreme Court, and in 1911 in the case of *Oliver v Hugo*, the Cape Provincial Division in its capacity as upper guardian, made an order for the personal custody of a minor orphan...". See also the dictum of Henochsberg J in *Short v Naisby* 1955 3 SA 572 D and 572 B discussed in chapter 5 under the role of the Supreme Court as Upper Guardian of All Minors.

144 1973 2 SA 182 W. See the discussion in chapter 4 on the Contract.

the circumstances. It is submitted that surrogacy agreements do not pose any threat to public policy as long as they are concluded with the bona fide intent to help an infertile couple and fall within socially acceptable parameters.

The next issue for consideration is whether the practice of surrogate motherhood contravenes present legislation.

#### **4.2.7        LEGISLATION PRESENTLY AFFECTING SURROGACY ARRANGEMENTS IN SOUTH AFRICA**

##### **4.2.7.1     HUMAN TISSUE ACT 65, of 1983 AND REGULATIONS IN TERMS OF THE ACT<sup>145</sup>**

The definition of artificial insemination in the Human Tissue Act<sup>146</sup> is wide enough to include the practice of surrogate motherhood. The Act defines "artificial insemination of a person" as:

"the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including

(a) the bringing together outside the human body of a male and female gamete or gametes with a view to placing the

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145    GN 1182 G, 10283 of 20-06-1986.

146    S 1 of the Human Tissue Act 65 of 1983. In 1989 the words "artificial insemination" were substituted in the English text with "artificial fertilization". See s 27 of Act 51 of 1989.

product of a union of such gametes in the womb of a female person; or

(b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of a female person".

In vitro insemination is defined in the Regulations as "the bringing together outside the human body of a male and a female gamete and the placing of the zygote in the womb of a female person".

The procedures of artificial insemination and in vitro fertilisation are lawful in South Africa, provided that the relevant sections of the Act and Artificial Insemination Regulations are complied with.

The Regulations, with the exception of reg 11 (specifying that the medical practitioner who effects artificial insemination must be registered with the Director-General of National Health and Population Development and that the premises on which the procedure takes place must be officially approved), are not applicable in respect of a married couple where the use of donor gametes is not involved. In other words, where the requesting couple's own genetic material is used as in the typical AIH (artificial insemination husband) situation, the Regulations do not apply.

Artificial insemination may only be effected by a medical practitioner or a person acting under his/her supervision<sup>147</sup> on a married woman with her husband's written consent.<sup>148</sup> Furthermore, gametes withdrawn from a living person may only be used for "medical purposes".<sup>149</sup> These aspects are discussed in Chapter 6 under Criminal Liability in Terms of the Human Tissue Act and Regulations.

A woman who, with the intent to become a surrogate mother, performs artificial insemination on herself by using a syringe filled with donor semen, will clearly act in contravention of the Act and Regulations and will be guilty of a criminal offence.<sup>150</sup> A South African case of an unmarried female who did this and subsequently gave birth to a child was reported in the press.<sup>151</sup> Apparently no prosecution was brought against her. It is highly unlikely that insemination of this kind will be resorted to otherwise than in very exceptional circumstances and the

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147 S 23(2) of the Act and reg 3.

148 Reg 8(1).

149 S 19 of the Human Tissue Act.

150 Penalties for non-compliance with the Act are a maximum fine of R2 000 or a maximum of one year imprisonment or both (s 34), while non-compliance with the Regulations carries a fine of R1 000 or six month's imprisonment (reg 14).

151 Sunday Times 13-03-1988.

law-enforcement agencies will - for obvious reasons - probably be reluctant to put the criminal process into action in isolated cases of this nature. There is nothing in the Act or the Regulations which prohibits a private agreement between the surrogate and the commissioning father to have sexual intercourse for the purpose of procreating a surrogate child, although such an agreement, if submitted, will be *contra bonos mores*. In the British case *In re Adoption Application (payment for adoption)*<sup>152</sup> the adoption of a surrogate baby was allowed although it was born as a result of sexual intercourse between the commissioning father and a surrogate mother. The court was unwilling to address issues of morality and ethics and suggested that policy issues should be formulated by Parliament and not the court.<sup>153</sup> Irrespective of the method used, the result will be the birth of a surrogate child which requires legal protection.

The provisions regulating artificial insemination in the Act and the Regulations are extensive. The detail of these requirements is discussed in chapter 6 where the Liability of Medical Practitioners in Assisted Reproduction Technology and Surrogate Motherhood is examined.

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152 3 WLR (Family Division) 19-06-1987 discussed *supra*.

153 At 34 C - H.



#### 4.2.7.2 CHILD CARE ACT 74 OF 1983

The Act came into operation during 1987. Certain provisions that may possibly be relevant to surrogacy agreements are contained in s 24(1) and (2) in terms of which compensation for adoption is prohibited.

S 24(1) provides as follows: "No person shall, save with the consent of the Minister, give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child".

S 24(2), again, provides as follows: "Any person who contravenes any provision of subsection (1) shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years or both such fine and such imprisonment".

If the surrogate mother is compensated for medical, hospital or attorney fees, an arrangement which normally forms part of a surrogacy agreement,<sup>154</sup> it could be construed as indirect compensation for adoption, should adoption after the birth of the child be sought by its genetic parents, in

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154 See chapter 5.

order to secure their rights to the child and the status of the child. It would seem that in the light of the Children's Status Act,<sup>155</sup> discussed *infra*, the genetic parents might well resort to an adoption application.

In *Commissioner of Child Welfare v Wynberg*<sup>156</sup> no weight was attached to the natural mother's consent to adoption, where the adoptive parents paid her confinement fees. From the dictum by Steyn R, it appears that the judge considered such compensation as payment for the child. The judge stated:

"In fact our Children's Act (referring to Act 33 of 1960) which is highly commendable legislation, has been designed to discourage bartering of children whether directly or indirectly."

The prohibition of compensation in the Children's Act of 1960,<sup>157</sup> and also in the Child Care Act of 1983,<sup>158</sup> serves as protection to the child as well as the adoptive and natural parents. It specifically provides protection to young, inexperienced, unmarried women who may be subjected

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155 82 of 1987.

156 1970 2 SA 76 C.

157 S 79.

158 S 24.

to undue pressure and be persuaded to give up their children and terminate their parental power essentially for financial considerations.

It is submitted that it would be wrong to construe compensation for loss of income and necessary expenses in a surrogacy arrangement as the giving of consideration for adoption. The intent of the parties, after all, is to compensate the surrogate mother for a direct financial loss and for expenses directly incurred.<sup>159</sup> It is, in my view, not consideration for adoption that may ultimately be considered as a legally necessary step to regularise the legal status of the child. In any event, it is to be noted that s 24(1) of the 1983 Act does not absolutely prohibit payment for adoption since compensation may take place with the consent of the Minister.

**4.2.7.3 CHILDREN'S STATUS ACT 82 OF 1987<sup>160</sup> AND THE  
REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS ACT  
81 OF 1963.**

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159 See also Lupton's discussion of the payment to the surrogate in 1988 DJ 47. He concludes that it is entirely justifiable to reimburse the surrogate for all her legitimate expenses and losses.

160 See chapter 5 under Common and Statutory Law Issues Affecting Surrogacy Arrangements.

The relevant sections of these two Acts are discussed jointly as the status of the child and the registration of the birth are closely linked.

Prior to 14 October 1987, children born in consequence of artificial insemination with donor sperm (AID) were considered as illegitimate in our law.<sup>161</sup> This position was rectified by the Children's Status Act. In terms of s 5(1)(a) children born as a result of artificial insemination with donor sperm and ova (which includes in vitro fertilisation embryo transfer to a surrogate mother)<sup>162</sup> are now considered to be the legitimate children of the woman giving birth and her husband, provided that the husband consented to the artificial insemination. The consent need not be in writing; there is, however, a presumption that consent was given.<sup>163</sup>

Section 5(2) of the Act provides for the termination of the rights, obligations and duties of the donors of semen and or

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161 V v R 1979 3 SA 1006 T.

162 S 5(3)(b).

163 S 5(1)(a) and (b). For a discussion of the consent requirement see Van der Walt L "Toestemming en die Vestiging van Ouerskap oor die Kunsmatig Verwekte Kind" 1987 Obiter 1 - 15.

ova towards the child.<sup>164</sup> It will therefore not be possible for a donor to claim any parental rights to the child and the child will likewise not be able to claim maintenance from a donor.

The notion of *mater semper certa est* and the presumption of paternity (*pater is est quem nuptiae demonstrant*) are now statutorily entrenched in the case of both artificial insemination with donor sperm and/or embryo transfer. Children born by artificial insemination with donor sperm will have to be registered as the children of the woman giving birth and her husband, who are considered the legal parents of the child.

Failure to provide the correct information on a birth registration form constitutes a criminal offence in terms of s 46 of the **Births, Marriages and Deaths Registration Act**. A married couple who commissioned a surrogate mother and who endeavour to register the child born to the surrogate as their own, will therefore risk criminal prosecution in terms of the Act.

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164 For a discussion of s 5 see Van Wyk A H "Mater Hodie Semper Incerta Est? 'n Evaluasie van Artikel 5 van die Wet op die Status van Kinders van 1987" 1988 TSAR 465 - 476.

The combined effect of the Children's Status Act and the Child Care Act has complicated contractual surrogacy arrangements in South Africa considerably.<sup>165</sup> The effects of the termination of parental rights of gamete donors in s 5 of the Children's Status Act on surrogacy are discussed in chapter 5.

#### **4.2.8 DETERMINATION BY THE COURTS WHETHER A CONTRACT CONFLICTS WITH STATUTORY REQUIREMENTS**

The application of a specific statutory enactment to a contract may affect the validity thereof. In South Africa where there is no direct regulation of surrogacy at present, validity of the contract will have to be determined with due regard to legislation indirectly affecting surrogacy, as discussed *supra*.

Statutes, in general, prohibit certain activities or behaviour, but very seldom expressly prohibit a certain form of contract.<sup>166</sup> In most instances the statute in question provides penalties for non-compliance. In deciding whether a contract is valid and enforceable, the statute is interpreted by the court and conflicting issues of public policy and private interests assessed. In reaching a

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<sup>165</sup> See Strauss 1989 Intern Legal Prac 70; Strauss 1988 S A Prac Man 5; Pretorius 1988 DR 82.

<sup>166</sup> Lubbe and Murray 1988 Farlam and Hathaway Contract 237.

decision the courts will, *inter alia* take into consideration the object of the statute, the harm it is directed against, the consequences of a particular interpretation of the statute, whether criminal sanctions are contained in the statute and whether these provide sufficient protection against the harm it is aimed at, whether the provision is *pro fisco* and does not deal with validity as such and whether it affords protection to individuals or the public in general.<sup>167</sup>

With reference to the various statutory provisions discussed *supra* my submissions are as follows:

(i) **Human Tissue Act 65 of 1983 and Regulations in terms of the Act**

The aim of the Act is, *inter alia* to regulate and govern the removal of tissue, blood or gametes from the bodies of living persons for therapeutic and other uses.<sup>168</sup> The Act furthermore extensively regulates tissue transplantation and removal of tissue from dead bodies. The latter bears no relevance to the present discussion.

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167 For a discussion, see Joubert 1987 General Principles of the Law of Contract 131 who provides a classification of different statutory provisions.

168 For a detailed discussion of the aim of this Act, see Strauss S A 1984 Doctor, Patient and the Law 147 *et seq.*

This Act is of particular importance for medical practitioners effecting artificial insemination or in vitro fertilisations. This aspect is discussed in more detail in chapter 6 under Criminal Liability in Terms of the Human Tissue Act and Regulations. The Act bears little relevance to surrogacy agreements as such, apart from the fact that the procedures by which gametes are removed and utilised, are extensively governed by the Act and Regulations.

It is to be noted that in terms of s 19 of the Act, minors and anyone who has been declared a habitual criminal in terms of s 286 of the Criminal Procedures Act 51 of 1977, or who is mentally ill within the definition of the Mental Health Act 18 of 1973, may not donate gametes.

As already discussed above, a woman who, with the intent to become a surrogate mother, performs artificial insemination on herself, will clearly act in contravention of the Act and Regulations as only medical practitioners may perform such procedures. Furthermore, a penalty is provided for in the Act as well as the Regulations.<sup>169</sup> It is submitted that any agreement entered with regard to such an insemination will be illegal and void.

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<sup>169</sup> S 34 of the Act and reg 14 of the Regulations.



(ii) Child Care Act 74 of 1983

As discussed *supra*, compensation for adoption is prohibited in terms of s 24(1) and (2) of the Act, which also contains criminal sanctions. It is, however, submitted that the object of this provision was specifically to protect young and inexperienced women from (financial) coercion by third parties to give up their children for adoption. It was never intended to regulate surrogate motherhood and compensation to the surrogate mother for legitimate expenses (and even loss of income) should, in the light of this, not be construed as payment for adoption and should not render the contract illegal.

(iii) Children's Status Act 82 of 1987

The aim of this Act is to provide legitimacy to children who were previously considered illegitimate in our law. The Act contains no penal clauses as it merely regulates the status of children.

(iv) Registration of Births, Marriages and Deaths  
Act 81 of 1963

This Act regulates the procedures regarding, *inter alia* registration of births. Persons registering the birth of a child must provide the correct information in all respects so that registration of the child may be effected.

Intentional, false declarations of particulars is a punishable offence in terms of s 46 of the Act.

#### 4.2.9 THE EFFECT OF ILLEGALITY - CONTRACT VOID OR UNENFORCEABLE?

In the presence of a statutory enactment which could have some bearing on the contract, albeit indirectly, the court, in consideration of policy aspects, and with reference to the other considerations discussed supra, may declare the contract invalid. Contracts concluded against good morals or public policy are void and therefore unenforceable. Where the agreement is concluded bona fide and no statutory requirement is infringed upon and it is also not considered contrary to public policy or contra bonos mores, the contract should be enforceable - either in its entirety or partially. The doctrine of severability is important in this regard.

#### 4.2.10 THE DOCTRINE OF SEVERABILITY AND THE RELEVANCE OF RESTRAINT OF TRADE AGREEMENTS<sup>170</sup> TO SURROGACY.

Interesting developments have occurred regarding restraint of trade agreements in our law over a long period of time.

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170 Kerr 1982 *Principles* 109 defines a restraint of trade agreement as follows: "An agreement or a covenant in an agreement, is said to be in restraint of trade when it restricts the liberty of one or both of the parties to engage in one or more specified commercial activities".

Although many restraint of trade agreements may be lawful, it was argued that if the agreement is unreasonable, it was *prima facie* void, unless the party who wanted to enforce the covenant could prove its reasonableness.<sup>171</sup> It is a principle of the law of contract that the courts will not formulate a contract for the parties. To ensure that contracts which contain unreasonable terms are not merely regarded as void, the so-called "doctrine of severability or divisibility" was developed. Thus the unreasonable terms, if they are severable, may be severed by the court and the remainder, which are considered reasonable, enforced.<sup>172</sup> The test of reasonableness plays a crucial role in a decision whether the contract is enforceable - not only *inter partes* but also with regard to public interest.<sup>173</sup> Public interest is determined at the time enforcement is sought.

Kerr,<sup>174</sup> after an in-depth discussion of the *Magna Alloys* case, poses the question whether the principle in *Magna*

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171 Kerr 1982 *Principles* and the cases cited at 111 n 92.

172 See Christie 1981 *Law of Contract* 352 et seq; Kerr 1982 *Principles* 109 et seq; Kerr A J "Restraint of Trade After *Magna Alloys*" in 1989 *Essays in Honour of Ellison Kahn Visser* C (ed) 186 - 198.

173 See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 A and the discussion of the case by Kerr in 1989 *Essays in Honour of Ellison Kahn Visser* (ed) 186 et seq.

174 1989 *Essays in Honour of Ellison Kahn Visser* (ed) 198.

Alloys, namely that enforcement of restraints depends upon the public interest at the time of enforcement, has a wider application. Relying on the recent case of *J Louw and Co (Pty) Ltd v Richter and Others*<sup>175</sup> and *Rentokil (Pty) Ltd v Appollis*,<sup>176</sup> the enforcement of any contract is dependent upon the court's finding concerning the public interest at the time of action. According to him, this also applies to other fields of law such as property or family law.

It is submitted that the "restraint of trade" decisions<sup>177</sup> and in particular the *Magna Alloys* case are thus relevant to surrogacy agreements. Should the court consider a part of the surrogacy agreement unreasonable, not only inter partes but also with regard to public interest, when an action is instituted, the unreasonable part could be severed from the rest and only the reasonable part enforced. In this way the terms - especially those protecting the child - could be severed from an otherwise invalid contract. Such terms may include those determining custody of the child in cases of breach, death or divorce of any of the parties, the creation of a trust for the child and even a decision by the court to grant the intended parents parental rights to the child.

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175 1987 2 SA 237 N.

176 1987 2 PH A41.

177 See Kerr 1982 Principles 109 et seq.

#### 4.3 CONCLUSION WITH REGARD TO LEGALITY

A clear distinction should be drawn between commercial surrogacy where third parties and/or the surrogate mother make a large profit, and altruistic surrogacy. In South Africa the former will probably lead to the conclusion that an agreement to that effect is null and void, as being *contra bonos mores*. The same conclusion cannot be reached regarding the latter. Altruistic surrogacy poses no threat to the public or the public morals, especially since it is mostly utilised in a family relationship or a relationship between close friends. Altruistic surrogacy should thus be permitted and the contract enforced.

A commercial surrogacy agreement would probably be without legal effect in South Africa. Those who enter into such agreements may suffer considerable financial losses and even the loss of their genetic child, should the surrogate fail to comply with the terms of the agreement.

Courts faced with surrogacy issues in other jurisdictions, have therefore generally preferred to disregard the contract and rely on the criterion of what is in the best interest of the child in reaching a decision.

It is, nevertheless submitted that the surrogate mother should be entitled to receive compensation for necessary

expenses, such as medical, hospital and maternity costs reasonably incurred, and possibly also loss of income. To that extent an agreement to reimburse the mother should, in my view, be enforceable.

There is no legislation at present barring surrogate motherhood in South Africa, although the Children's Status Act complicates the procedure considerably.<sup>178</sup> It is therefore submitted that this Act should be amended to exclude the practice of surrogate motherhood.<sup>179</sup>

## 5 BREACH OF CONTRACT AND AVAILABLE REMEDIES

### 5.1 INTRODUCTION

Although there is an inherent risk of breach in any contract, the surrogate motherhood contract presents special difficulties. Most cases of breach of contract before the courts in England and the USA, have involved refusal on the part of the surrogate mother to hand over the baby to the intended parents after birth. In such instances the courts have, so far, preferred to disregard the contract and rely

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178 See Strauss S A "Regstatus van K.I. ~ Kinders en Kinders Gebore uit Surrogaatmoeders" 1988 S A Praktyksbestuur 5; Strauss S A 1989 Intern Legal Prac 70; Pretorius R 1988 DR 81.

179 See the Recommendation in chapter 7.

on the criterion of the best interest of the child in deciding who should be awarded custody. The reported cases of breach have arisen predominantly from commercial surrogacy arrangements.

Although a court may disregard the whole or part of the contract, depending on its view regarding the *boni mores*, it is nevertheless advisable to draft the contract in a way that anticipates the possibility of breach.<sup>180</sup> This will provide a clear indication to the parties of their rights and obligations.

## 5.2 FORMS OF BREACH OF CONTRACT

Breach of contract in general include the following:<sup>181</sup>  
*mora debitoris*, *mora creditoris*, positive malperformance, prevention of performance and repudiation.

Breach of the contract by the surrogate mother or the contracting couple can present itself in various forms, but is usually in the form of repudiation.<sup>182</sup>

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180 See the Proposed Contract in chapter 4.

181 See De Wet and Van Wyk *Kontraktereg en Handelsreg* 142 et seq; Kerr 1982 *Principles* 333 et seq; Joubert 1987 *General Principles of the Law of Contract* 201 et seq; Lubbe and Murray 1988 *Farlam and Hathaway Contract* 471.

182 See the discussion *infra*.

Having regard to the court cases reported so far,<sup>183</sup> the most probable form of breach is refusal by the surrogate mother to hand over the baby after birth. It is proposed in this thesis to discuss other forms of breach as well, and to examine possible remedies available to the parties in such instances. Since most forms of possible breach of a surrogacy agreement have, so far, not received the attention of the courts, my discussion will of necessity be largely speculative. It goes without saying that if a court were to be called upon to adjudicate a concrete dispute, its decision would depend on whether it regarded the contract as valid, either in its entirety or partially, and what the exact facts of the case before it were.

### 5.3 REMEDIES

If surrogacy is to be legislatively regulated at a future stage, it is necessary to establish a sound theoretical basis for the possible remedies available for breach of contract. Three broad categories of contractual remedies may be distinguished. First, those aimed at enforcement of the contract, secondly, those aimed at rescission/cancellation and thirdly those aimed at compensation.<sup>184</sup> Remedies aimed

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183 See chapter 2.

184 Van Aswegen A Die Sameloop van Eise uit Kontrakbreuk en  
(Footnote Continued)



at enforcement of the contract are specific performance and the *exceptio non adimpleti contractus*; rescission combined with restitution is aimed at cancellation; and a claim for damages is aimed at compensation.

As the same act may, in certain circumstances, constitute both a breach of contract and a delict, claims based on breach of contract could, conceivably, be instituted together with delictual claims for compensation or in the alternative.<sup>185</sup> If the contract is invalid or unenforceable, the only available remedy for recovering patrimonial loss, would be a delictual claim, provided all the requirements had been met.

The acts from which various claims arise, give rise to different remedies.<sup>186</sup> The contractual action for damages is aimed at putting the plaintiff in the position which he/she would have enjoyed had the contract been properly performed

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(Footnote Continued)

Delik LLD Unisa 1991 116 - 117. See also Lubbe and Murray 1988 *Farlam & Hathaway Contract* 530 et seq.

185 See in general Van Aswegen 1991 *Sameloop van Eise*; Neethling, Potgieter and Visser 1990 *Law of Delict* 215 et seq; Van der Walt J C 1979 *Delict* 7 - 11; Van der Merwe and Olivier 1989 *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 463 et seq.

186 Neethling, Potgieter and Visser 1990 *Law of Delict* 215 - 216; Van der Walt 1979 *Delict* 8; Van der Merwe and Olivier 1989 *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 463 et seq.

(positive interesse). The object of an award for damages in a delictual action, on the other hand, is to put the plaintiff in the position which he/she would have enjoyed had the delict not been committed (negative interesse).<sup>187</sup>

It is submitted that in surrogacy arrangements, especially if the contract is considered valid and enforceable, the claim will most likely be based on contract, although a delictual claim cannot be ruled out, especially since the practice of surrogacy is not regulated at present.

### 5.3.1 REMEDIES AIMED AT ENFORCEMENT OF THE CONTRACT

#### 5.3.1.1 SPECIFIC PERFORMANCE<sup>188</sup>

This remedy is in principle always available to the innocent party who wants to secure performance of the contract. The court, has, however a discretion in giving such an order.

The remedy of specific performance in South Africa was examined by the court in the case of *Schierhout v Minister*

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187 Neethling, Potgieter and Visser 1990 *Law of Delict* 220.

188 See De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 188 et seq; Joubert *General Principles of the Law of Contract* 229 et seq; Kerr 1982 *Principles* 397 et seq.

of Justice<sup>189</sup> and a precedent set for the view that specific performance should not be granted if breach of contract is of a personal nature.<sup>190</sup> However, in more recent decisions, the courts have indicated a greater willingness to grant specific performance under certain circumstances. This was the case in *National Union of Textile Workers v Stag Packings (Pty) Ltd and Another*<sup>191</sup> and even more recently in *Benson v SA Mutual Life Assurance*.<sup>192</sup> No surrogate motherhood cases have been decided by South African courts as yet, but it is uncertain whether our courts will grant an order for specific performance *ex contractu*. In any event, courts faced with problems of breach of a surrogacy agreement will, prior to granting an order for specific performance, carefully consider the advantages and disadvantages of such an order for the parties.<sup>193</sup>

#### 5.3.1.2 EXCEPTIO NON ADIMPLETI CONTRACTUS<sup>194</sup>

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189 1926 AD 99 at 107.

190 See Christie 1981 *Law of Contracts* 510 - 511.

191 1982 4 SA 151 T.

192 1986 1 SA 776 A.

193 See Joubert 1987 *General Principles of the Law of Contract* 224 et seq; De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 188 et seq.

194 For a discussion, see De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 177 - 188; Joubert 1978 *General Principles of the Law of Contract* 229 - 236.

This defence is utilised where the performances by the parties are related in the sense that one performance is a *quid pro quo* for the other. For instance, if the surrogacy agreement is considered as a form of lease or rendering of a service, it could be utilised by either party, who has performed, or who insist on simultaneous performance by the other, as a defence.

Although this is often considered a remedy for breach of contract, the opinion has also been expressed that it serves as a mechanism to effect specific enforcement of the contract.<sup>195</sup>

### 5.3.2 REMEDIES AIMED AT CANCELLATION

#### 5.3.2.1 RESCISSION<sup>196</sup>

Rescission is considered a drastic step in the law of contract and can only be taken under exceptional circumstances. A rescission clause may be incorporated in the contract which provides the parties with either an unfettered choice of rescission or the possibility of

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195 Van Aswegen 1991 *Sameloop van Eise* 121.

196 See Joubert 1978 *General Principles of the Law of Contract* 236 et seq; De Wet and Van Wyk 1978 *Kontraktereg en Handelsreg* 194 et seq.

rescission should certain events take place. Material breach of the contract may also provide a party with such a right. Notification of rescission is required, but it can be given expressly or tacitly as long as it leaves no doubt in the mind of the other party to the contract.<sup>197</sup> The most important effect of rescission is that the right to performance, as specified in the contract is dissolved and the parties may claim back their respective performances. The innocent party is also entitled to damages suffered as a result of the breach of contract.

### 5.3.3 REMEDIES AIMED AT COMPENSATION

#### 5.3.3.1 DAMAGES AS A REMEDY<sup>198</sup>

Any breach of contract resulting in damages, provides the innocent party with a right to recover such damages.

The question that begs an answer is whether a court will award any form of damages to either of the parties involved in a surrogacy agreement which has been breached. May the

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197 Joubert 1987 General Principles of the Law of Contract 243.

198 See Joubert 1987 General Principles of the Law of Contract 246; De Wet and Van Wyk 1978 Kontraktereg en Handelsreg 200 et seq.

couple for instance, apart from patrimonial loss,<sup>199</sup> institute a claim for damages for the loss of the child or intangible loss caused by emotional shock, pain and suffering resulting from the surrogate's nonperformance of the contract?

A claim for damages based on breach of contract can only succeed if patrimonial loss is proved. This will be the case if the couple has already compensated the surrogate mother for her services and/or medical and legal expenses. It is not possible to recover intangible loss, such as damages for discomfort, pain and suffering and loss of amenities of life *ex contractu*.<sup>200</sup>

If the contract is considered null and void in its entirety, and accordingly unenforceable, no remedies will of course be available to the parties on the ground of contractual liability. It is, however, submitted that a non-commercial agreement concluded in good faith and with the intent to be legally bound, should be valid and enforceable. This is in line with the view that the courts will enforce contracts if all the formal requirements have been met, unless they

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199 *ex contractu*, or *ex delicto* by means of the *Lex Aquilia*.

200 *Administrator of Natal v Edouard* 1990 3 SA 581 590 A and 595 E.

contravene public policy. The discretion of the court with regard to public policy should be exercised with caution and utilised only if the harm to the public has been clearly established, which, it is submitted, is not the case with non-commercial surrogacy agreements. As stated by Thirion J in the *Edouard* case:<sup>201</sup> "Courts of law will be reluctant to discover new principles of morality or considerations of expediency and policy on which to invalidate contracts which on accepted legal principles would be valid, because it is a fundamental principle of our law as well (a principle which is itself based on public policy) that contracts which have been freely and seriously entered into should be enforced."

#### **5.3.4 SPECIFIC PERIODS DURING WHICH THE SURROGACY AGREEMENT MAY BE BREACHED AND AVAILABLE REMEDIES**

Three periods may be distinguished during which the contract may be breached:<sup>202</sup>

- 1 before and immediately after artificial insemination;
- 2 during pregnancy; and
- 3 after the birth of the child.

Each of these possibilities is discussed separately.

##### **5.3.4.1 BREACH BEFORE AND IMMEDIATELY AFTER ARTIFICIAL INSEMINATION**

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201 At 378 I.

202 Dodd Bette J "The Surrogate Mother Contract in Indiana" 1982 Ind L Rev 820.

This is the case where the surrogate mother refuses to be inseminated with sperm of the contracting husband, or in full surrogacy, refuses transfer of the intended parents' zygote to her womb. In such instances there is a repudiation of the contract before the date for performance which constitutes anticipatory breach.<sup>203</sup> The commissioning couple may elect to institute an action claiming damages for financial loss.

In the first instance financial loss is restricted to the cost of the medical procedures already performed, which will not be substantial. In the latter incidence, however, a considerable financial loss may be experienced by the surrogate's refusal to have the zygote transferred to her reproductive organs. In full surrogacy the female donor of ova (intended mother) and the surrogate mother's menstrual cycle must be synchronised, utilising hormonal treatment prior to insemination. This is followed by a procedure commonly referred to as an "egg pickup" which is performed under anaesthetic, and in vitro fertilisation, both of which are expensive procedures.

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203 Kerr 1982 Principles 342.



Under certain circumstances specific performance of a contract is available as a remedy for breach. It is, however, extremely unlikely that any court will order specific performance under these circumstances.<sup>204</sup> If the contract is considered unenforceable for whatever reason, a claim for patrimonial damages *ex contractu* will fail.

The surrogate mother could also breach the contract by having sexual intercourse with her husband two weeks prior to or two weeks after artificial insemination contrary to a specific stipulation in the contract. This creates the possibility of the baby not being genetically related to any of the intended parents. In the light of the general principles regarding legality, this stipulation in the contract may be *contra bonos mores* and void. If the intended parents are able to prove that the child is not genetically related to them, but the child of the surrogate mother and her husband, they should be able to rescind from the contract as the child has been conceived in the natural way and is in all respects the child of the surrogate mother and her husband. They should also not be held liable for compensation of the surrogate mother or child support.<sup>205</sup>

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204 See the discussion *infra*.

205 By the enactment of the Children's Status Act, the presumption of paternity in cases of artificial and in vitro fertilisation was statutorily entrenched so that  
(Footnote Continued)

#### 5.3.4.2 BREACH DURING PREGNANCY

Breaches of contract envisaged here, are inadequate medical care and having an abortion without consulting the contracting couple.

Inadequate medical care is difficult to monitor. Unless the intended parents can prove damages as a result of the inadequate medical care, they will not have any recourse.

In an ordinary surrogacy agreement the surrogate mother undertakes to carry the foetus to term and not to have an abortion unless the legal requirements have been met in accordance with the Abortion and Sterilization Act.<sup>206</sup> Should the surrogate have a legal abortion without consulting the contracting couple, this incident does not constitute breach of the contract but rather supervening impossibility of performance which terminates the obligation to perform.<sup>207</sup> Thus the couple will have no recourse as the

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(Footnote Continued)

there is no question of any possible legal duties towards the child by donors of sperm and/or ova. The surrogate mother and her husband, if he consented to the insemination, are considered the legal parents of the child and are legally obliged to support the child unless their rights are terminated by adoption or by a court order for some reason.

206 2 of 1975.

207 See the discussion of De Wet and Van Wyk 1978  
(Footnote Continued)

surrogate is released from her duty and the personal right of the commissioning couple extinguished. Although it is recommended that such a decision should be discussed with the couple, it is nevertheless submitted that the surrogate should have the autonomy to reach her own decision in this regard.

If the surrogate has an illegal abortion with the intent to terminate the contract, it would constitute positive prevention of performance of the contract. The intended parents, may, under these circumstances claim damages for patrimonial loss.

#### 5.3.4.3 BREACH AFTER THE BIRTH OF THE CHILD

The most obvious way in which the surrogate mother may breach the contract is refusal to hand over the child after birth. Failure to perform constitutes either mora or can indicate repudiation of the contract for which damages may be claimed.

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(Footnote Continued)

Kontraktereg en Handelsreg 156 et seq with regard to the differences between supervening impossibility and repudiation.

Whether specific performance as an alternative remedy is available is at present uncertain.<sup>208</sup>

When a surrogate mother refuses to hand over the baby after birth, the issue is, at present, mostly treated as a custody suit between the parties, in which reliance is placed on the best interest of the child. It is, however, suggested that some of the problems can be eliminated by enforcing the terms of the contract subject to the careful screening of the parties to the contract and prior scrutiny of the contract by a court as discussed in more detail in chapter 7.

Interestingly enough, in most cases of custody disputes in regard to surrogacy agreements, the intended parents have been awarded custody on the grounds of the welfare of the child. Although these decisions were not based on principles of the law of contract, an argument could be raised that specific performance was indirectly ordered and the required result obtained.

If the intended parents are awarded custody of the child, the question remains whether the surrogate mother will have any rights to the child, for instance, visitation rights.

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208 See the discussion *supra*.

The question of parental power and in whom it vests is a highly emotional issue, as was clearly demonstrated by the Baby M<sup>209</sup> case in New Jersey and there seem to be no easy answers. In Baby M the contracting couple, in whose care the child had been at the beginning of the judicial proceedings was awarded custody. The surrogate mother was granted visitation rights by the New Jersey Supreme Court.<sup>210</sup> As the child was already living with the intended parents, the court based its decision on the criterion of the best interest of the child. Despite this order, the court emphasised that the contract was invalid and unenforceable as payment of money is not permissible in adoption cases. The court in casu thus relied on ordinary principles of family law in granting custody to the contracting couple.

Generally speaking, the courts seem reluctant to take a child of tender age from a mother and award custody to the (biological) father, although each case should be considered on its merits and special circumstances may be present. Another possible option for the court is to award custody jointly to the parties involved in a surrogate motherhood dispute. Thus joint custody was awarded by an Illinois court

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209 See chapters 2 and 6.

210 For an in-depth discussion of the Baby M case, see 1987 NJSLS 330 especially with regard to visitation rights. See also chapters 2 and 6.

in the United States in the case of *Wagner v Erber*.<sup>211</sup>

Custody of a five year old girl was awarded jointly to the girl's mother, the mother's ex-husband and the girl's biological father. It is submitted that such an award has the potential of creating a tug-of-war for the child and would probably not serve the best interest of the child.<sup>212</sup>

### 5.3.5 BREACH BY THE COMMISSIONING COUPLE

Breach by the commissioning couple in surrogate motherhood arrangements is less likely to occur, especially in the case of altruistic surrogacy. Inducement to commit a breach of contract, may, however occur where the child is born with a physical or mental defect or where the couple simply change their minds. Breach of contract may also occur if artificial insemination resulted in multiple births and the parents desired a single child. Another possibility is where the child is born from a different ethnic group. This actually happened in New York, USA, where a white woman gave birth to a black baby after the sperm of her dying husband had

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211 85 D 6382. Discussed by O'Brien S "Commercial Conceptions: A Breeding Ground for Surrogacy" 1986 N C L Rev 149 - 150 n 193.

212 Hahlo H R 1985 *The South African Law of Husband and Wife* 392; *Heimann v Heimann* 1948 4 SA 926 W; *Edwards v Edwards* 1960 2 SA 523 D; *Schlebusch v Schlebusch* 1988 4 SA 548 at 552 D contra *Kastan v Kastan* 1985 3 SA 235 C.

allegedly been mislaid in an unfortunate incident at a sperm laboratory.<sup>213</sup>

A failure to accept performance properly tendered or a refusal to accept performance for inadequate reasons constitutes *mora creditoris*. Indications by the intended parents that they do not intend honouring the contract, may also constitute repudiation. The surrogacy contract usually also contains a stipulation to the effect that the intended parents will assume full legal responsibility for any child born as a result of the agreement, irrespective of congenital or other abnormalities. In entering the agreement with the surrogate and with the awareness that artificial insemination could result in multiple births or the birth of a handicapped child, the commissioning couple assume the risk of such an incident occurring.

Apart from the financial effects of breach of contract, legitimate concerns have also been raised about the potential of psychological harm to a child who is not wanted by either party to the contract. The possibility of this happening was clearly demonstrated by the Malahoff/Strivers incident in 1983 in the USA where the baby was born microcephalic and neither Mr Malahoff nor the Strivers

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213 Reported in Sunday Star 10-03-1990.

wanted it.<sup>214</sup> It is submitted that the intent of the parties to a surrogacy agreement is to obtain a child for the intended parents, of which one is also the genetic parent. It is therefore submitted that the intended parents should not be permitted to refuse to accept a child which suffers from a physical or mental handicap, unless they can prove that the child is not their genetic child and that they are therefore not the parents of the child. Another incident was reported in 1987 in the **New England Journal of Medicine** where a surrogate mother passed HIV infection to the foetus, and neither the surrogate nor the natural father wanted custody of the infant.<sup>215</sup> In this particular case the surrogate mother, who had been an intravenous drug user, had not been screened prior to conception.<sup>216</sup>

Another form of breach of contract is nonpayment by the contracting couple (if payment has been agreed upon contractually). As commercial surrogate motherhood and payment for termination of parental power will probably be regarded as *contra bonos mores* and unenforceable in South

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214 Discussed in chapter 2. See also Cappuccio "Surrogate Motherhood in Ohio: A Dangerous Game of Baby Roulette" 1985 *Cap U L Rev* 104 - 105.

215 For a discussion see Rothenberg K H "Surrogacy and the Health Care Professional Baby M and Beyond" in 1990 *Surrogate Motherhood* Gostin L (ed) 214.

216 At 220 n 117.



Africa, it seems doubtful that the surrogate mother will be successful in securing any form of payment for her services, except compensation for necessary expenses, which in my view, she would in any event be entitled to claim if provided for in the contract.

## 6 DELICTUAL LIABILITY

Should the surrogacy agreement for some reason be considered unenforceable in either its entirety or partially, the parties should still be permitted to recover patrimonial and non-tangible<sup>217</sup> loss by the institution of the appropriate delictual claim, provided all the requirements have been met. Delictual and contractual actions may also concur under certain circumstances and the injured party may then choose whether he wants to institute his claim *ex contractu* or *ex delicto*.<sup>218</sup>

### 6.1 ACTIO LEGIS AQUILIAE, ACTIO INIURIARUM AND ACTION FOR PAIN AND SUFFERING

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217 Non-tangible loss eg a claim for pain and suffering can, at any rate, only be claimed with a delictual action. See in this regard *Edouard v Administrator, Natal supra* and *Administrator, Natal v Edouard supra*.

218 See in general Van Aswegen 1991 *Sameloop van Eise*; Neethling, Potgieter and Visser 1990 *Law of Delict* 215 et seq; Boberg 1989 *The Law of Delict* 1 et seq.

In principle a distinction is drawn between delicts which cause patrimonial loss (*damnum iniuria datum*) and those which cause injury to personality (*iniuria*). Damages for a wrongful and culpable act causing patrimonial loss are claimed with the *Actio Legis Aquiliae*, whereas the *Actio Iniuriam* is used to claim satisfaction (*solatium*) for a wrongful and intentional injury to personality. Apart from these two actions, compensation for injury as a result of the wrongful and negligent (or intentional) impairment of the bodily or physical-mental integrity may be claimed with the Action for Pain and Suffering. These three actions form the pillars of the law of Delict.<sup>219</sup>

**6.1.1 THE MOST LIKELY FORMS OF BREACH IN SURROGACY ARRANGEMENTS AND APPLICABLE DELICTUAL CLAIMS**

**6.1.1.1 REFUSAL TO HAND OVER THE CHILD AFTER BIRTH AND OBTAINING AND ILLEGAL ABORTION OF THE CHILD**

The most common form of breach of the surrogacy contract is the refusal by the surrogate mother to hand the baby over to the intended parents after birth and obtaining an illegal abortion of the child.

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219 See Neethling, Potgieter and Visser 1990 Law of Delict 5 - 17; Van der Walt J C 1979 Delict 17 - 20.

1 The *actio iniuriarum* and a contractual action may concur in circumstances where the breach of contract also constitutes an *iniuria* against the party who has suffered harm, but this will not necessarily be the case.<sup>220</sup> An example is provided with reference to breach of promise. It is accepted that breach of contract (in *casu* a promise to marry) does not *per se* constitute an *iniuria*.<sup>221</sup> This will only be the case if the plaintiff can prove that the breach was not only wrongful, but "injurious or contumelious". This view was supported in *Guggenheim v Rosenbaum*,<sup>222</sup> where breach of a promise to marry, was found not *per se* to constitute an *iniuria*. If the *actio iniuriarum*, which is the appropriate action in this case, is instituted, it is a separate action.

Whether the refusal of the surrogate mother to hand over the baby to the intended parents also constitutes an *iniuria* - especially in full surrogacy - seems uncertain. For the *actio iniuriarum* to succeed, wrongfulness and intent (*animus iniurandi*) must be proved. The contracting couple are thus

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220 See Neethling, Potgieter and Visser 1990 *Law of Delict* 217; Van der Walt 1979 *Delict* 8; Van der Merwe and Olivier 1989 *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 468 - 483.

221 See *Guggenheim v Rosenbaum* 1961 4 SA 21 W for breach of an engagement promise.

222 *supra*.

required to prove that the refusal of the surrogate mother, apart from patrimonial loss, constitutes an intentional<sup>223</sup> infringement of a right of personality, ie the wounded feelings of the couple (possibly their feelings of piety).<sup>224</sup> The problem created by rapid advances in modern birth technology, is that rights to zygotes and embryos have not yet been crystallised. Even where the surrogate carries the genetic child of the intended parents, it is not yet clear whether the intended parents have rights of personality to such a "child". Therefore it is not certain whether the surrogate's refusal to hand the child to the intended parents after birth, constitutes an iniuria, although to my mind such an action could not be ruled out as the wounded feelings of the couple should be taken into account.<sup>225</sup>

The *actio iniuriarum* succeeded in a case where there was an intentional and willful violation of the feelings of

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223 Intent may possibly be present in the form of *dolus eventualis* as the surrogate mother could have foreseen that her refusal to hand over the child to the intended parents could cause injury, but nevertheless decided to keep the child.

224 Neethling, Potgieter and Visser 1990 *Law of Delict* 296 and examples at 296 n 252 where the courts have taken cognisance of the feelings as a personality interest in assessing the amount of satisfaction to be awarded.

225 See in this regard Neethling 1985 *Persoonlikheidsreg* 197 et seq.

another. Thus in *E Els v Bruce; J Els v Bruce*<sup>226</sup> where the plaintiff suffered injury to her health as a result of threats and insults by the defendant, the court ordered compensation with the *actio iniuriarum*.<sup>227</sup>

2 The *actio legis Aquilia* may concur with a contractual claim or be instituted separately if all the requirements are met. In breach of contract by the surrogate mother (despite the fact that the contract may be invalid), damages for patrimonial loss may be claimed with this action. It is submitted that in most instances the action will be instituted for pure economic loss<sup>228</sup> and in rare instances, negligent misrepresentation.<sup>229</sup> These are forms of *damnum iniuria datum* which have, in practice, emerged under different names. Pure economic loss may be claimed where patrimonial loss does not result from damage to property or injury to personality of the person instituting the

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226 1922 EDL.

227 See Neethling 1985 *Persoonlikheidsreg* 93.

228 See Neethling, Potgieter and Visser 1990 *Law of Delict* 246 *et seq.* Van Aswegen 1991 *Sameloop van Eise* 172 *et seq.*

229 Neethling, Potgieter and Visser 1990 *Law of Delict* 250 *et seq.*; *Administrateur van Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 A; *Kern Trust (Edms) Bpk v Hurter* 1981 3 SA 607 C.

action.<sup>230</sup> It is thus an ideal action for the recovery of damages resulting from medical expenses in surrogacy cases.<sup>231</sup> To prove wrongfulness it must be established that there has been an infringement of a subjective right<sup>232</sup> or breach of a legal duty. In most of the cases before our courts for pure economic loss, wrongfulness was found in the breach of a legal duty.<sup>233</sup> The question posed is whether there was a legal duty to avoid pure economic damage in the circumstances - thus the general criterion of reasonableness or *boni mores*. Applying this criterion, the courts will

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230 Neethling, Potgieter and Visser 1990 *Law of Delict* 246; Van Aswegen 1991 *Sameloop van Eise* 172 et seq.

231 The courts approach such claims circumspectly for fear of creating indeterminate liability, but there is no reason to refuse this remedy in *casu*. In *Arthur E Abrahams & Gross v Cohen and Others* 1991 2 SA 301 312 B it was stated by Marais J that: "The persons to whom the duty is owed are not members of a large and indeterminate class. They are few in number and immediately identifiable. The nature of the loss they may suffer is not indeterminable. On the contrary, it is obvious what it will be. The time when such loss may be suffered is similarly not indeterminate; it is also known." See in this regard Boberg 1989 *Law of Delict* 104 - 105; Neethling J "Die Onregmatigheidsvereiste by Deliktuele Aanspreeklikheids Weens die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies" 1983 *THRHR* 205 - 211 for a discussion of the role of the courts in determining policy issues in cases of pure economic loss.

232 The contract between the parties, if it is valid, provides a personal right (right of performance), which is a legally recognised interest.

233 See Neethling, Potgieter and Visser 1990 *Law of Delict* 247 and the cases cited in n 109. See also *Arthur E Abrahams & Gross v Cohen and Others supra*.

carefully weigh up the interests of the parties involved. Factors which may be considered by a court in determining the reasonableness of conduct, are *inter alia* the nature and extent of the harm and of the foreseeable or foreseen loss; the possible value to the defendant or to society of the defendant's harmful conduct; the nature of the relationship between the parties; the motive of the defendant; the legal position in other countries; ethical and moral issues as well as other considerations of public interest.<sup>234</sup> The criterion of the *boni mores* in establishing wrongfulness is of particular importance in two instances:

(i) where no established category of wrongfulness or justification is involved and (ii) for the purposes of refinement in borderline cases.<sup>235</sup>

In a surrogacy situation where the contract is breached by the refusal to hand the child over to the intended parents after birth, the element of wrongfulness, may be construed from the breach by the surrogate mother of a legal duty to avoid damage. Certain factors, such as a special relationship between the parties or the existence of a contract between them, whether enforceable or not, are

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234 Neethling, Potgieter and Visser 1990 *Law of Delict* 33 and cases cited in n 22.

235 Neethling, Potgieter and Visser 1990 *Law of Delict* 39.

indicative of the existence of a legal duty.<sup>236</sup> By instituting one of these actions the intended parents may claim legal, medical and other expenses.

3 A claim may, under certain circumstances, also be instituted for pain and suffering, should the requirements be met.<sup>237</sup> It may also coincide with another delictual action, such as the *actio legis Aquiliae*, or even with an action for patrimonial damages *ex contractu*.<sup>238</sup> The action for pain and suffering allows for the recovery of a *solatium* from someone who has negligently caused another pain as a result of bodily injury suffered. The interest protected by this action is the *corpus* (physical integrity). Forms of injury compensated include pain and suffering, loss of amenities of life, shock, shortened expectation of life and

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236 Neethling, Potgieter and Visser 1990 *Law of Delict* 247 with reference to *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 D 379 - 380; Van Aswegen 1991 *Sameloop van Eise* 174 and n 283.

237 Neethling, Potgieter and Visser 1990 *Law of Delict* 17; Van der Walt 1979 *Delict* 19; *Hoffa v S A Mutual Fire and General Insurance Co Ltd* 1965 2 SA 944 C 951 - 952.

238 *Edouard v Administrator, Natal supra* at 394.



disfigurement.<sup>239</sup> The plaintiff may claim for physical pain as well as mental anguish with this action.<sup>240</sup>

Specific attention should be afforded to an action for emotional shock. This action is of particular importance as the effect of breach of contract in surrogacy cases may result in severe trauma.<sup>241</sup>

This action protects the whole physical and mental integrity of a person and usually falls under the action for pain and suffering. The general requirements for delictual liability also apply here. Compensation is granted for patrimonial loss or sentimental damage caused by intentional or negligent infliction of emotional shock.<sup>242</sup> In an action based on emotional shock, the event must cause a "sudden, painful emotion or fright resulting from the realisation or

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239 Neethling, Potgieter and Visser 1990 Law of Delict 208 - 209; Van der Merwe and Olivier 1989 Die Onregmatige Daad in die Suid-Afrikaanse Reg 242 et seq.

240 Neethling, Potgieter and Visser 1990 Law of Delict 218 et seq; Van der Merwe and Olivier 1989 Die Onregmatige Daad in die Suid-Afrikaanse Reg 476 - 477.

241 The leading case in this regard is *Bester v Commercial Union Versekeringsmaatskappy van S A Bpk* 1973 1 SA 769 A. See also Van der Walt J C "Skoktoediening: "Wie Sal die Aftreksom Maak?" in 1988 *Hulcigingsbundel vir W A Joubert Strauss S A* (ed) 247 - 260.

242 Intent is therefore not required, which is a prerequisite for the action *iniuriarum*. Potgieter J M "Emotional Shock" 1979 *LAWSA W A Joubert* (ed) 2 et seq.

perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief".<sup>243</sup>

Van der Walt,<sup>244</sup> on the strength of *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*,<sup>245</sup> remarks that compensation will undoubtedly be awarded under this action if clear psychiatric damage is present, whether it is in the form of a neurosis or an hysterical reaction, as long as it is not merely a temporary outburst.<sup>246</sup>

It is submitted that should a surrogate mother refuse to hand over the baby after birth, which may be genetically linked to one or both parents, such an event could spark severe emotional trauma for the intended parents. If this results in serious physical or mental injury and all the other requirements of this action are met, there is no reason why such an action should not be permitted.

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243 Ibid.

244 1988 Huldigingsbundel vir W A Joubert Strauss (ed) 249.

245 1973 1 SA 769 A.

246 The *de minimis non curat lex* principle is applicable. See *Lutzkie v SAR & H* 1974 4 SA 396 W; *Muzik v Canzone del Mare* 1980 3 SA 470 C.

Similarly, where an illegal abortion is performed without the consent of the commissioning couple, the argument could possibly be raised that the requirements for delictual liability in the form of shock or pain and suffering may be present and that the couple should receive some compensation.

In considering the degree of pain and suffering, the courts will pay particular attention to factors which are capable of objective assessment such as age, sex, status, culture and mode of living.<sup>247</sup>

#### 6.1.1.2 POSSIBLE DEFENCES AGAINST DELICTUAL CLAIMS

It may be argued that the surrogate mother is under no legal obligation to hand the child over to the intended parents at birth. One must bear in mind that acts which were performed in the exercise of a right or duty were not wrongful in Roman-Dutch law unless the person abused his right or duty by acting *contra bonos mores*, with improper motives or immoderately.<sup>248</sup> This principle applies to all delictual claims.

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247 See in this regard Neethling, Potgieter and Visser 1990 *Law of Delict* 206 - 207.

248 Van der Walt 1979 *Delict* with reference to Voet 47 10 2.

To my mind, a distinction should be drawn between full and partial surrogacy. It is submitted that in partial surrogacy the decision of the surrogate mother to keep the baby which is genetically linked to her, constitutes the exercise of her common law (and now also statutory right)<sup>249</sup> to the child. Seen in this light, her act, despite her promise or contractual agreement to hand the child over after birth, cannot be seen as an impairment of the physical integrity of the contracting couple. The natural father (donor of semen) could prove paternity prior to the Children's Status Act. The presumption of paternity (*pater is est quem nuptiae demonstrant*) is, however, now statutorily entrenched in the Children's Status Act<sup>250</sup> and all the rights of the donor are terminated.<sup>251</sup> As the commissioning couple have no rights to the child in terms of the Children's Status Act it may be difficult to prove that the decision of the surrogate mother not to hand over the baby after birth, constitutes an infringement of a subjective right of the commissioning couple.

As argued *supra* the breach of her promise by the surrogate mother, may cause moral suffering and a possible

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249 In terms of s 5 of the Children's Status Act.

250 S 5(1).

251 S 5(2).

infringement of the intended couple's feelings of piety.<sup>252</sup> Courts confronted with such a dilemma will probably consider each case on its merits.

In the light of the above discussion, it is uncertain whether the contracting couple will succeed in a delictual action. Since Roman-Dutch Law does not recognise the loss of life as a loss for which compensation may be claimed, the loss of a child will not be delictually actionable - with the exception of the possibilities set out in the previous paragraphs.

## 7 CONCLUSION

It has been said that the procreation of a child in the framework of a contract is "like trying to fit a square peg into a round hole".<sup>253</sup> The simple fact is, however, that the child is not procreated by the contract, but the contract serves as a statement of the intent of the parties. It furthermore provides the parties with some guidelines regarding their rights and duties and, most importantly, it serves to protect the interest of the child. The argument is

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252 See Neethling, Potgieter and Visser 1990 Law of Delict 296.

253 O'Brien 1986 N C L Rev 151 quoting a Jefferson County Kentucky circuit court judge.

sometimes advanced that it is illogical to initiate a potentially harmful situation for the child and then later resolve difficulties by implementing the best interests of the child to resolve the situation.<sup>254</sup> There are, however, no guarantees of any kind for any child coming into this world - irrespective of how it was conceived. A potentially harmful or unstable situation, such as divorce or death of a parent in later life, can never be discounted, not to mention a variety of potential social, health or other problems. The fact that some infertile couples choose surrogacy as a final option despite inherent uncertainties, serves as a confirmation of their determination and courage.

Our law of contract with its Roman-law background, is a well-developed and flexible system. Although some contracts have their own rules,<sup>255</sup> parties are as a general rule free to decide how and with whom they wish to conclude a contract. There are, of course, the limitations on freedom to contract already discussed.<sup>256</sup>

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254 O'Brien 1986 N C L Rev 146.

255 Kerr 1982 *Principles* 135 and n 271, 272 and 273. Hahlo H R and Kahn E 1960 *The South African Legal System and its Background* 123 gives the examples of sale, lease, suretyship, master and servant, and some mercantile law contracts.

256 For instance that it must not contravene statutory requirements, public policy, *boni mores* and the requirement of a *iusta causa*. See discussion *supra*.

Instead of disregarding well-established principles of the law of contract in the surrogacy situation, these should rather be implemented to provide guidelines, not only to those wishing to enter into surrogacy agreements, but also to courts called upon to adjudicate on disputes flowing from surrogacy issues. It is submitted that the child's interest could be well protected in a written contract. In *Basetti v Louw*,<sup>257</sup> for instance, Margo J was willing to grant an order validating an agreement between the father and mother of an illegitimate child, regulating maintenance, custody and access. In *casu* the parties did not wish to marry and entered into a type of "settlement" agreement. The father, for instance, made provision for support of the child through an insurance policy.

In chapter 4 a proposed surrogacy agreement contract is described and analysed.

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257 1980 2 225 W.

CHAPTER 4            ANALYSIS OF A PROPOSED SURROGATE MOTHER  
AGREEMENT MODEL

1     INTRODUCTION

As there is no legislation regulating surrogacy in South Africa at present, a surrogacy contract can take the form of a short written contract, addressing the most important issues or it can be a detailed document with provisions anticipating as many potential pitfalls as possible and attempting to regulate these in a satisfactory way. The contract should also be drawn up in such a way that the best interest of the child is protected. The legal problems surrounding surrogate motherhood have enjoyed the attention of several South African jurists,<sup>1</sup> of which only a few have addressed the contract as such.<sup>2</sup>

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1     Strauss S A 1982 in *Die Proefbuisbaba: Toekomsskok of Nuwe Burger?* Pieterse (ed) 20; Strauss S A "Regstatus van K.I.-Kinders en Kinders Gebore Uit Surrogaatmoeders" 1988 S A Praktyksbestuur 5; Strauss S A "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 Intern L Prac 70 - 71; Lupton M L "The Status of Children Born by Artificial Insemination in South African Law" 1985 TSAR 277 - 295; Lupton M L "Surrogate Parenting: The Advantages and Disadvantages" 1986 TRW 148 - 157; Lupton M L "The Right to be Born: Surrogacy and the Legal Control of Human Fertility" 1988 DJ 36 - 58; Tager L "Surrogate Motherhood, Legal Dilemma" 1986 SALJ 381 - 404; Pretorius R "Surrogaat-Moederskap: Implikasies in die Suid-Afrikaanse Regstelsel" 1987 DR 270 - 278. See also the discussion in chapter 3 under the *Boni Mores*.

2     Lupton M L *The Legal Consequences of Artificial Insemination and Embryo Transplantation in Humans D*  
(Footnote Continued)



As stated in the previous chapter, the contract will only be valid and enforceable to the extent that no statutory provisions are contravened and the contract as such is, or certain of its provisions are, not considered *contra bonos mores* or against public policy. The issue of the *boni mores* was dealt with in detail in chapter 3 and for the purpose of this discussion, it is assumed that the contract is not *contra bonos mores* or against public policy, particularly in the absence of a commercial objective and after careful screening of the parties.

The surrogate mother agreement model discussed in this chapter, is based on one used by an American agency, *Surrogate Family Services*, in Kentucky.<sup>3</sup> Similar contracts are also used by the Infertility Center of New York, run by Noel Keane, who pioneered commercial surrogacy arrangements in Michigan USA. The contract discussed here has been adapted to suit local conditions and in particular to be in accordance with our common law and to meet existing statutory requirements. The implications and complications surrounding certain provisions are discussed in footnotes.

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(Footnote Continued)

Phil University of Natal 1982 104 *et seq*; Pretorius R "A Comparative Overview and Analysis of a Proposed Surrogate Mother Agreement Model" 1987 CILSA 275 - 293.

3 Brophy K M "A Surrogate Mother Contract to Bear a Child" 1982 J Fam L 263 - 291.

As there are a number of variations possible in surrogacy contracts, each contract should be framed to suit the needs of the parties thereto. In the first known surrogacy case in South Africa, the Anthony/Ferreira-Jorge surrogacy,<sup>4</sup> the intended parents (the Ferreira-Jorges) contributed genetically to the child. In vitro fertilisation was used and the embryos were transferred to the grandmother, Mrs Anthony, who acted as a host mother or human incubator. In the USA partial surrogacy is used more frequently than complete surrogacy and probably in a majority of cases the women are compensated for their services.<sup>5</sup> In the USA it is also not uncommon for a woman to act as surrogate several times for the same couple, so that the children resemble each other.<sup>6</sup> Another form of surrogacy is where the intended parents enter into two surrogacy agreements with different surrogate mothers simultaneously with the result that they receive two surrogate babies at approximately the same time<sup>7</sup> A relatively rare form of surrogacy is where the child is

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4 See also the discussion in chapter 5 under law of persons.

5 See Parker P J "Motivation of Surrogate Mothers: Initial Findings" 1983 *Am J Psychiatry* 117 - 118, where research revealed that 89% of the women interviewed are motivated by the prospect of compensation.

6 Personal communication with Noel Keane, the Michigan attorney who pioneered surrogacy in the USA, during a study tour May 1989.

7 Personal communication with Noel Keane 1989.

not at all genetically related to the commissioning couple. In these situations neither of the intended parents is capable of producing gametes. The situation envisaged for instance, is where the intended mother's uterus and ovaries have been removed surgically and the husband suffers from azoospermia (absence of sperm) or oligospermia (a low sperm count). In such instances, family members may wish to assist the couple by providing sperm and ova so that the child may be indirectly genetically related to one or both of the intended parents.<sup>8</sup>

Despite the various forms of surrogate motherhood, there is one common purpose when the agreement is signed, namely to provide a means whereby the prospective parents may become the legal parents of the child, born as a result of artificial insemination. The purpose is not for the surrogate mother and her husband to obtain a child for themselves. It is, however, exactly this part of the agreement which has in some instances caused considerable problems, for instance, the Baby M case. The main reason is that it is practically impossible to predict exactly what the surrogate mother's emotions will be once the child has been born.<sup>9</sup> The risk of eventual breach of contract is

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8 Pretorius R 1991 De Jure 52 - 62 59 - 56.

9 Personal discussion with American psychiatrist, Dr Phil Parker in Michigan - May 1989

perhaps greater where the surrogate mother is also the genetic mother of the child and where there is a profit motive.

Brophy suggests<sup>10</sup> that in partial surrogacy, the wife of the intended (biological) father should not be a party to the surrogacy agreement as she will later have to adopt the child. The reason advanced by her is that if the surrogate's hospital and attorney costs are paid by the couple, it could be construed as payment for a child<sup>11</sup>, which is statutorily prohibited in most countries and also by our Child Care Act.<sup>12</sup>

To exclude the intended mother from the agreement merely to avoid the obstacles in the Act which prohibits compensation for adoption, is unsatisfactory. There is a vast difference between surrogacy and so-called "baby-selling". In the

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10 1982 J Fam Law 264.

11 Case law on this point is also not consistent. In *Doe v Attorney General* discussed in chapter 2 under court decisions in the USA, compensation of the surrogate during adoption proceedings was considered unlawful. This was also the opinion of the lower court in *Kentucky v Surrogate Parenting Associates Inc*, but the Supreme Court of Kentucky reversed the decision of the lower court in *Surrogate Parenting Assoc v Kentucky ex rel Armstrong* in 1986 and clearly distinguished between surrogacy agreements and the buying and selling of children as prohibited by the statutes in question - see discussion chapter 2.

12 S 24 of Act 74 of 1983.

former the parties enter into the agreement with the intent that the child born as a result of the agreement, will be the child of the intended parents and not of the surrogate mother.<sup>13</sup> It is submitted that there should be no objection to making the intended husband and wife parties to the contract as it is after all the commissioning mother who will bear the primary responsibility for the emotional and physical needs of the baby after its birth.

Since at present complete or full surrogacy seems more acceptable to the South African society than partial surrogacy, the model in the discussion is designed to regulate such a situation. With a few adaptations, however, it could also serve as a model for other forms of surrogacy.

Compensation of the surrogate, apart from necessities, is also not included in the model, as it is unlikely that commercial surrogacy will be acceptable to our society at present. In full surrogacy, ova of the intended mother are fertilised with semen from her husband or a sperm donor outside the human body in a laboratory, ie in vitro - the

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13 See the discussion in chapter 7 under Compensation of the Surrogate Mother. See also Lupton 1988 DJ 42 et seq for the differences between surrogacy and payment for adoption.

so-called "test tube babies". Some writers<sup>14</sup> prefer to use the term SET or surrogate embryo transfer for this procedure. If the in vitro fertilisation is successful, the embryo is transferred to the womb of the surrogate mother, who, in this case, is a hostess mother with no genetic contribution to the child. The parties to such an agreement will be the intended parents as well as the surrogate mother and her husband. Full/complete surrogacy is used in cases where the intended mother cannot carry the foetus to term either because of some physical abnormality or the absence of a uterus. Healthy ovaries are, however present in these women and they are therefore capable of producing ova.

Despite the fact that the enforceability of surrogate motherhood agreements may still be uncertain in many countries, it remains preferable to have the agreement in writing as this can at least provide some indication to the parties of their rights and obligations as well as potential pitfalls.<sup>15</sup>

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14 Mallory T E and Rich K E "Human Reproductive Technologies: An Appeal for Brave New Legislation in a Brave New World" 1986 Washburn L J 490.

15 See also the discussion in chapter 6 under Liability of Medical Practitioners in Assisted Reproduction Technology and Surrogate Motherhood under Informed Consent.

A proposed Surrogate Parenting Agreement is presented in the next section.

## 2 SURROGATE PARENTING AGREEMENT

THIS AGREEMENT is entered into this ..... day of 19...  
by and between:

.....

(hereinafter referred to as "surrogate") and

.....

her husband,

(hereinafter referred to as "husband") and

.....

the natural/genetic father and

.....

the natural/genetic mother

(hereinafter referred to as the "intended parents")

**THIS AGREEMENT IS MADE WITH REFERENCE TO THE  
FOLLOWING FACTS:**

- 1.1 The intended parents are married to each other, over the age of twenty-one (21) years and unable to have a child of their own without assisted conception.  
The intended parents desire to have a child, carried by the surrogate mother and which will be genetically related to them.
- 1.2 The surrogate and her husband are a married couple<sup>16</sup> each over the age of twenty-one (21) years who desire to assist the intended parents in obtaining a child who is biologically related to at least one of them.

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16 In terms of Regulation 8(1) of the Human Tissue Act supplementary Regulations, artificial insemination may be performed only on a married woman.



PURPOSE AND INTENT OF THE AGREEMENT

- 2.1 The sole purpose and intent of the agreement is to provide a means for the intended parents to become the legal parents of a child/children who is/are genetically related to at least one of them, through assisted conception.
- 2.2 The sole purpose and intent of the surrogate mother and her husband is to assist the intended parents to obtain a child who is genetically related to at least one of them. The purpose of the agreement is not for the surrogate and her husband to obtain a child for themselves and to become the parent/s of any child conceived through assisted conception.
- 2.3 The parties fully understand and are in full agreement with the purposes, intents and provisions as stated above.

DEFINITIONS<sup>17</sup>

- 3.1 "Assisted conception" means a pregnancy resulting from
- (i) fertilising of ova of a woman with sperm of a man by means other than sexual intercourse and
  - (ii) implanting the resultant embryo in the s of the surrogate mother.
- 3.2 "Physician"<sup>18</sup> means a registered medical doctor/s who will be responsible for evaluation, artificial insemination or treatment of the surrogate relating to conception and pregnancy.
- 3.3 "Surrogate" means an adult, married woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents.

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17 These definitions are, to a large extent, obtained from the United States of America proposed Uniform Status of Children of Assisted Conception Act drafted by the the National Conference of Commissioners on Uniform State Laws, approved and recommended for enactment in all the States, Washington D C July 29 - August 5 1988; See the discussion in chapter 2 under USA legislation.

18 In terms of S 23(2) of the Human Tissue Act 65 of 1983 as well as reg 3 of the Regulations, artificial insemination may only be affected by a medical practitioner or a person acting under his/her supervision.

3.4 "Intended parents" means a man and woman, married to each other<sup>19</sup>, who enter into a surrogacy agreement, providing that they will be the parents of a child born to the surrogate mother through assisted conception using ova or sperm of one or both of the intended parents.

3.5 "Child" means the surrogate child or children born from a surrogate mother as a result of assisted conception.

3.6 "Donor" means an individual (other than the surrogate) who produces eggs or sperm used for assisted conception. (\*Optional if donor is involved)

In consideration of the mutual promises contained herein and with the intention of being legally bound, the parties hereby agree as follows:

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19 It is preferable for the surrogate mother to have had at least one child prior to this agreement as she may then better understand the implications and possible complications of the pregnancy. Psychologically it should be easier for her hand the child over at birth.

## ASSISTED CONCEPTION AND PREGNANCY

- 4.1 The surrogate agrees to the placement of the embryo(s), resultant from the assisted conception with sperm from the intended/genetic father and the ova from the intended mother in her uterus.
- 4.2 The surrogate and her husband agree, in the best interest of the child born as a result of the procedure, not to form or attempt to form a parent-child relationship with any child the surrogate may conceive pursuant to the provisions of this contract.
- 4.3 The surrogate and her husband agree that it is the exclusive and sole right of the intended parents to name the child.<sup>20</sup>

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20 This clause in the agreement is a result of the Baby M case in the United States where the child was given different names by the surrogate and the intended parents.

#### TERMINATION OF PARENTAL POWER

(conferred on the surrogate and her husband  
in terms of s 5 of the Children's Status Act  
82 of 1987)

- 5.1 The surrogate and her husband agree to freely and readily, in conformity with applicable statutory regulations, sign any/all documents or affidavits necessary for termination of their parental power and to assist in the adoption of the child by the intended parents.<sup>21</sup>

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21 See the detailed discussion on Parental Power in chapter 5, the Law of Persons. As a general rule, an agreement to transfer or delegate parental power permanently, is invalid and contra bonos mores and will not be enforceable. Parental power may, however be transferred or delegated by adoption, divorce or

- 5.2 The surrogate and her husband agree to assist the intended parents in obtaining adoption of the child by the intended parents<sup>22</sup> by providing written consent<sup>23</sup> to such adoption as required by Section 18(4)(d) of the Child Care Act.<sup>24</sup>
- 5.3 The husband of the surrogate agrees to do all or any acts necessary to rebut the presumption of paternity should it be required by a court of law or otherwise.
- 5.4 The intended parents agree to initiate adoption proceedings within a reasonable time after the birth of the child.<sup>25</sup>

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22 It is submitted that the status of the child should be determined prior to insemination and that adoption should not be necessary as is presently the case. See the recommendations in this regard in the proposed Surrogacy Arrangements Act in chapter 7.

23 Should adoption be necessary, the consent of the surrogate mother's husband must be obtained before she is artificially inseminated in order to comply with reg 8 of the Regulations. See the discussion of the effect of the Children's Status Act on Parental Power and the Status of the Child in chapter 5 under the Effect of the Termination of Parental Rights of Gamete Donors in s 5 of the Children's Status Act on Surrogacy.

24 74 of 1983.

25 This is a necessary step to ensure that there is no violation of s 10 of the Child Care Act which specifically provides that a person may not receive a child for the purpose of adoption, and maintain it apart from the parents for longer than 14 days, unless an adoption application has been filed.

- 5.5 The surrogate mother agrees to hand the child over to the intended parents and they, in turn, agree to accept the child as soon as the medical practitioners caring for the child and surrogate mother, declares the baby fit to leave the hospital.

6

**MEDICAL AND HEALTH CARE**

- 6.1 The surrogate agrees to keep the intended parents informed through the physicians attending her, regarding expected assisted conception, medical testing and delivery dates as well as the results of the assisted conception and medical tests.
- 6.2 The surrogate agrees to notify the intended parents, through the physicians attending her, of her expected delivery date as soon as it is known as well as the actual delivery date within twenty-four (24) hours after the birth, if medically possible.
- 6.3 The surrogate and her husband agree not to have sexual intercourse for the duration of the assisted conception as advised by the physicians responsible for the

procedure.<sup>26</sup>

- 6.4 Should the artificial insemination prove to be successful, the surrogate agrees to carry the embryo/foetus (hereinafter referred to as "child") for the full term of the pregnancy, until delivery to the intended parents.
- 6.5 The surrogate agrees that she will not try to abort the child once conceived, except, if the requirements of the Abortion and Sterilization Act<sup>27</sup> have been met, namely when it is the opinion of the physicians attending her that such an action is necessary because the pregnancy might endanger the physical or mental

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26 See also chapter 3 under Breach of Contract. Although this term may be considered *contra bonos mores*, it is nevertheless important as was demonstrated in the unreported case of Mahlahoff/Strivers in the USA in 1983. Judy Striver, a surrogate mother from Michigan, agreed to bear a child for Alexander Malahoff, who was separated from his wife at that stage. In *casu* the contract contained a clause which prohibited the surrogate and her husband from having intercourse two weeks prior to insemination. However, no mention was made of the period after artificial insemination. A child suffering from microcephaly was born and Mr Malahoff contested paternity on the ground that he was not the father. The surrogate, Striver, and her husband had intercourse in the period after the insemination and paternity tests proved that Mr Striver was indeed the father of the child. For a discussion of this case see "Surrogate Motherhood in Ohio: A Dangerous Game of Baby Roulette" 1985 *Cap U L Rev* 104 - 105.

27 2 of 1975.



health of the surrogate or child as envisaged by the provisions of the Act.<sup>28</sup>

- 6.6 The surrogate agrees not to participate in any activities which could be harmful to the life and health of the child.<sup>29</sup>
- 6.7 The surrogate undertakes to follow the normal prenatal medical examination schedule i e at least one (1) visit per month during the first seven (7) months of pregnancy, two (2) visits during the eighth (8) month and four (4) weekly visits during the ninth (9) month of pregnancy.
- 6.8 The surrogate agrees to adhere to all medical

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28 See also the discussion in chapters 3 and 7. The most equitable way to regulate the situation where one of the parties wants an abortion, but not the other/s is to let the final decision rest with the surrogate or "carrier". The situation envisaged is where the doctors might discover through amniocentesis or other tests, that the child suffers from a severe defect. The pregnancy could be at an advanced stage and the surrogate might not be prepared to have an abortion, while that is what the commissioning couple requests.

29 The parties to the contract are free to regulate the activities of the surrogate mother in greater detail. It is, however, hardly possible for the natural father effectively to regulate such activities. Should the surrogate mother breach any provisions of the agreement, it is uncertain whether a court would order specific performance of the contract. See the discussion in chapter 3.

instructions given to her by the attending physicians involved in the procedure and not to take any form of non-prescriptive drugs.

## 7

### COMPENSATION, EXPENDITURE AND INSURANCE

- 7.1 It is agreed that the surrogate mother will not receive any compensation other than necessary expenses relating to medical procedures, legal expenses, maternity clothes, transport and loss of income.<sup>30</sup>
- 7.2 The intended parents will be responsible for all medical expenses incurred as a result of the pregnancy not covered or allowed by the surrogate and her husband's present medical scheme or insurance, including:
- \* physical and psychological screening;
  - \* the assisted conception process/processes and regular follow-up examinations after conception;
  - \* the birth itself;
  - \* post-partum examinations, continuing for at least one

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30 The most controversial part of the agreement is the matter of compensation, which is dealt with under the Boni Mores in chapter 3. See also the Recommendations in chapter 7 under Compensation.

- (1) month after the birth of the child;
- \* hospitalisation;
- \* pharmaceutical expenses;
- \* laboratory and pathology costs;
- \* therapy.

- 7.3 The intended parents shall take out and pay the premiums of a term-life insurance policy payable to a named beneficiary of the surrogate with a policy amount of R..... and the policy shall remain in effect for six (6) months subsequent to the birth of the child.
- 7.4 In addition the intended parents shall make appropriate arrangements in a will for the support of the infant child, should one of the intended parents die prior to the birth of the child.
- 7.5 In the event of the death of one or both of the intended parents, prior to the release of custody to them, the surrogate and her husband agree to assist the survivor in adopting the child.
- In the event of the death of both of them, the surrogate and her husband agree to place the child with a guardian designated by the intended parents.
- 7.6 The intended parents shall take out and pay the premiums of a term-life insurance policy on their

lives, payable in trust to the unborn child and shall maintain such policy for three months (3) after the birth of the child. The intended parents shall be jointly and severably liable for the payment of the said premium.

- 7.7 The parties agree that should any of their respective marriages end in divorce prior to the birth of the child, this will not affect the rights and obligations of the parties under the agreement or the purpose of the agreement in any way. It is understood that in divorce proceedings, the court will decide who should have custody of the child, once it has been born, on the basis of what will be in the best interest of the child.<sup>31</sup>

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31 This provision is included in the agreement to protect the surrogate child should any of the parties divorce prior to its birth. Although careful screening of the parties should limit the incidence of divorce to a minimum, one must consider support of the surrogate mother, should she and her husband get divorced prior to the birth of the child. One can either rely on support by her spouse, if statutory requirements are met. See in general Van der Vyver J D and Joubert D J 1985 *Persone- en Familiereg* 690 - 694; Cronjé D S P 1990 *Barnard Cronjé and Olivier Die Suid-Afrikaanse Persone- en Familiereg* 380 et seq. An indemnity clause may be added to the agreement in which the natural father undertakes to provide reasonable support to the surrogate for six months prior to the birth of the child and three months after the birth, subject to the discretion of the court handling the divorce settlement.

## PHYSICAL AND PSYCHOLOGICAL EVALUATION

- 8.1 The surrogate agrees to undergo a complete physical<sup>32</sup> as well as a psychological assessment<sup>33</sup> prior to assisted conception and to make the results of these examinations available to the intended parents. The surrogate hereby authorises the doctor/s and health-care worker/s attending her to disclose these results to the intended parents.
- 8.2 The intended parents agree to undergo complete physical as well as psychological assessment prior to assisted conception and to make the results of these available to the surrogate. The intended parents hereby authorises the doctor/s and health-care worker/s

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32 In terms of reg 5 of the Human Tissue Act supplementary Regulations, medical practitioners performing the artificial insemination, must ascertain that the donor has had medical tests for sexually transmitted diseases (reg 5(a)(i)) as well as sperm analysis (reg 5 (a)(ii)) at least one year prior to the donation. The results of these must also be filed. See also the discussion in chapter 6 under Criminal Liability in terms of the Human Tissue Act and Regulations.

33 See also reg 10(a)(iii) and (iv) of the Regulations in terms of which the medical doctor performing the artificial insemination must record certain details on the recipient's file, amongst other things, psychological and social suitability as well as the results of certain medical tests.

attending them to disclose these results to the surrogate.

- 8.3 The parties to the contract agree to undergo any pathology tests, deemed necessary by the doctor/s attending them.
- 8.4 The husband of the surrogate agrees to submit to a paternity blood test (HLA type) and to do all other acts necessary to rebut the presumption of paternity, should it be required by the intended parents or a court of law.

#### **ASSUMPTION OF RISK**

- 9.1 The surrogate and her husband understand and agree to assume all risks including the risk of death which are incident to conception, pregnancy, childbirth and post-partum complications.
- 9.2 The intended parents assume full legal responsibility for any child who may possess congenital or other abnormalities.

**CIVIL LIABILITY CLAIMS<sup>34</sup>**

10.1 The surrogate and her husband agree not to institute any action or bring any claim against the intended parents, should any permanent disability or death of the surrogate result from the pregnancy.<sup>35</sup>

10.2 The parties to this agreement shall not institute any action or bring any claim against the physician/s with regard to any of the medical procedures referred to in this agreement performed in good faith and with due care.<sup>36</sup>

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34 See the discussion in chapter 6 on the Liability of Medical Practitioners in Assisted Reproduction Technology and Surrogate Motherhood.

35 Should the surrogate suffer any disability or even death, the husband will still be able to institute a claim against the insurance company.

36 See chapter 6 under Liability of Medical Practitioners in Assisted Reproduction Technology and Surrogate Motherhood under Criminal Liability in terms of the Human Tissue Act and Regulations.

10.3 The parties to this agreement shall not institute any action or bring any claim against the legal advisers involved in the drawing up of this contract or any other assistance or services rendered by them (including in respect of legal proceedings), in good faith and with due care.

11

#### EXECUTION OF THE AGREEMENT

11.1 Each party acknowledges that he or she fully understands the agreement and its legal effects and that he or she is signing the agreement freely and voluntarily<sup>37</sup> and that neither party has any reason to believe that the other did not freely and voluntarily execute the said agreement.

11.2 The parties agree to comply with the prescribed procedures contained in the Human Tissue Act<sup>38</sup> and the supplementary Regulations<sup>39</sup> to that Act as well

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37 See the discussion in chapter 6 under Informed Consent in Assisted Reproduction and Specifically Surrogacy.

38 65 of 1983.

39 GN R1182 GG 10283 of 1986-06-20.



as the Births, Marriages and Deaths Registration Act.<sup>40</sup>

12

#### TERMINATION OF CONTRACT

12.1 If the pregnancy has not occurred within a reasonable time after insemination, and in consultation with the medical practitioners, the agreement can be terminated.

13

#### CONFIDENTIALITY

13.1 The parties agree to maintain complete confidentiality with regard to the subject matter of this contract and agree that no information shall be provided to the news media, the public or any individual or group which could disclose the identity of the parties involved, or the identity of the child.

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40 81 of 1963.

SEVERABILITY CLAUSE<sup>41</sup>

14.1 In the event of any of the provisions of this agreement being held invalid or unenforceable by a court of law, the same shall, subject to such court's discretion, be deemed severable from the remainder of this agreement and shall not cause the invalidity or unenforceability of the entire agreement, especially where enforcement of certain sections is specifically aimed at protecting the best interest of the child. Should certain provisions however be deemed invalid, due to their scope or breadth, then the provision/s shall be valid to the extent permitted by law, subject to the court's discretion.

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41 See the discussion in chapter 3, under The Doctrine of Severability and the Relevance of Restraint of Trade Agreements to Surrogacy.

ENTIRE AGREEMENT

15.1 This surrogate parenting agreement sets forth the entire agreement between the parties with regard to the subject matter hereof.

15.2 This agreement or any clause thereof, may only be amended with the written consent of all the parties involved.

We have read the foregoing pages of this agreement and it is our intention by affixing our signatures below, to enter into a binding legal obligation.

.....	.....
SURROGATE MOTHER	DATE

.....	.....
HUSBAND	DATE

.....	.....
INTENDED HUSBAND AND WIFE	DATE

.....	.....
WITNESS	DATE

### 3 CONCLUSION

Although it is impossible to anticipate all the possible forms of breach which may occur in a surrogacy arrangement, it is hoped that such a basic written agreement may alert the parties to potential legal and medical pitfalls.<sup>42</sup>

Because of the complexity of surrogacy agreements, it is admittedly difficult to regulate the agreement adequately by a written contract alone. It is however submitted that the interest of the child can to a large extent be protected in the contract. A court faced with a surrogacy dispute or application should at least enforce those parts of the contract which are included for the benefit of the child - should it be unwilling to enforce the entire contract.<sup>43</sup>

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42 See chapter 6, under Informing the Intended Parents and the Surrogate and her Husband.

43 See chapter 3, under Specific Performance in South Africa and under The Doctrine of Severability and the Relevance of Restraint of Trade Agreements to Surrogacy.

## CHAPTER 5                    OTHER PRIVATE LAW ASPECTS

### 1                    LAW OF PERSONS AND THE FAMILY

#### 1.1                COMMON AND STATUTORY LAW ISSUES AFFECTING                      SURROGACY ARRANGEMENTS

##### 1.1.1            INTRODUCTION

The object of a surrogacy agreement is to obtain a baby for a childless couple who are unable to have one the "natural way". In this chapter the legal relationship between the child and the surrogate mother and her husband, as well as the intended relationship between the child and the commissioning couple, are examined. Common law principles are analysed to determine whether they still adequately protect a child born through assisted birth technology - especially in surrogacy arrangements.

The principles embodied in the common law maxims, *mater semper certa est* and *pater is est quem nuptiae demonstrant*, respectively, are analysed in the light of the South African view that consanguinity is the determining factor for legal

parenthood.<sup>1</sup> A conclusion is reached as to whether this principle promotes the best interest of the child. The relevant provisions of the Children's Status Act<sup>2</sup> are evaluated on the same grounds.<sup>3</sup>

Social, psychological, moral, religious and other aspects undoubtedly play a significant role in surrogacy arrangements since the family unit of the surrogate and her husband as well as the commissioning couple are profoundly affected. Although these aspects cannot be ignored, the focus throughout the chapter will, nevertheless, remain primarily on legal aspects of surrogate motherhood.<sup>4</sup>

The status of children born through assisted reproduction is also examined and a comparison is drawn between the common

- 
- 1 See South African Law Commission's Report: Verslag oor die Onderzoek na die Regsposisie van Buite-egtelike Kinders Project 38 October 1985 127.
  - 2 82 of 1987.
  - 3 See also the discussion in chapter 3 under Legislation Presently Affecting Surrogacy in South Africa.
  - 4 The social, psychological, moral, ethical and religious issues of surrogate motherhood are addressed in most major reports on modern birth procreation, such as the 1984 Warnock Report (Britain) the 1989 Glover Report (to the European Commission), the 1985 Benda Report (West-Germany), the 1985 Ontario Law Reform Commission Report (Canada) and the Australian Reports mentioned in chapter 2.

law situation prior to the Children's Status Act, when such children were regarded as illegitimate,<sup>5</sup> and the present situation under the Children's Status Act.

Although the legislature did not intend to address surrogacy in the Children's Status Act,<sup>6</sup> possibly because more urgent issues captured its attention at that stage, the Act is nevertheless indirectly applicable since artificial or in vitro fertilisation techniques are generally utilised.<sup>7</sup> The question posed is whether the Children's Status Act does not have an unduly detrimental effect on the well-being of surrogate children? Since the welfare of the child has always been a paramount consideration, it is questionable whether such children should be treated differently from

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5 V v R 1979 3 SA 1004 T. See also the discussion of Strauss S A 1984 Doctor, Patient and the Law 187 - 189; Schutte M Die Hervorming van die Regsposisie van Buite-Egtelike Kinders met Besondere Verwysing na die Status van Kinders deur Kunsmatige Bevrugting Verwek LLD Unisa 1986 135 - 148; Lupton M L The Legal Consequences of Artificial Insemination and Embryo Transplantation in Humans D Phil Univ of Natal 1982 215 - 267.

6 See the Law Commission's Report 137; see also the statement of the Minister of Health and Population Development during the 2nd reading of the bill in the House of Assembly Debates 10 September 1987 6160 - 6161.

7 An agreement to physical intercourse is of course also possible - see the British case, In re Adoption Application (payment for adoption) discussed in chapter 2.

others merely because of the way they were conceived. As Ormrod J stated in the English case, *A v C*,<sup>8</sup> dealing with a surrogate child: "By far the best thing that can happen to this child is that he should become a member of a family just like other children. This will give him as normal a life as possible."<sup>9</sup>

#### 1.1.2 GENETIC AND LEGAL RELATIONSHIPS BETWEEN PARENT AND CHILD

A distinction is often drawn between genetic and legal relationships between parent and child. Whereas the genetic relationship refers to the "biological bond", the legal relationship embraces the rights and duties as between parent and child. This is sometimes referred to as parental power or natural guardianship. In most instances the genetic parent is also the legal parent of a child, but this is not necessarily the case. Although the genetic relationship cannot be altered, legal rights and duties may reside in or be awarded to someone who is not the genetic parent of the child. Familiar common law principles have in the past provided assistance in establishing legal parenthood, but with the advances in modern birth technology, some of these

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8 See the discussion in chapter 2.

9 At 457 E of the report.



no longer reflect absolute truths and can no longer provide the solution to all problems. Earlier in the twentieth century, matters of a personal nature such as family planning and birth control were generally left alone by legislatures and policy-makers.<sup>10</sup> This standpoint - which was followed by most governments - prompted President Eisenhower to make the following statement in 1959: "Birth control ... is not our business. I cannot imagine anything more emphatically a subject that is not a proper political or governmental function or responsibility". From the time of President Eisenhower's statement, the picture has changed considerably. Many governments have been forced to take note of advances in the field of modern birth technology and to enact legislation which affects the legal relationship between parents and their children.

## **2 COMMON LAW STATEMENTS AND MAXIMS**

### **2.1 MATER SEMPER CERTA EST**

The mater semper certa est statement precedes the following well-known statement in D 2 4 5 of the Corpus Iuris Civilis:

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"... quia semper certa est. etiam si vulgo conceperit; pater vero is est, quem nuptiae demonstrant".

Literally it means that the mother is always certain. As Schutte<sup>11</sup> points out, it is merely a statement of fact in our common law, as the (physical) possibility did not exist at that time that anyone other than the gestational (birth) mother (who is also the genetic mother) could be the legal mother of the child.<sup>12</sup> Unlike the *pater is est quem nuptiae demonstrant* maxim, it has therefore always been irrebuttable. It was never necessary to define "mother" in legal terms.

With the rapid advances in modern birth technology, as many as three women may now claim some form of maternal rights to a child and the basic tenets of family law have become uncertain.<sup>13</sup> We have reached the stage where the word

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11 1986 *Hervorming* 147.

12 See Lupton M L 1985 "The Status of Children Born by Artificial Insemination in South African Law" 1985 *TSAR* 295 who apparently classifies it as a presumption.

13 Wadlington W "Artificial Conception: The Challenge for Family Law" 1983 *Va L Rev* 465 - 514; Stumpf A "Redefining Mother: A Legal Matrix for New Reproductive Technologies" 1986 *Yale L J* 187 - 207; Barnett D L "In Vitro Fertilisation: Third Party Motherhood and the Changing Definition of Legal Parent" 1985 *Pac L J* 231 - 259.

"mother" warrants a definition in any Act purporting to deal with matters concerning parents and children.

The uncertainty of legal motherhood may be illustrated by a simple example. If a woman is, for instance, unable to produce ova herself, an ova donor may be included in the assisted reproduction programme. The ova can be combined with semen from the infertile woman's husband or a donor and the embryo transferred to a surrogate mother who carries the foetus to term. The GIFT method, which has become increasingly popular, may also be used.<sup>14</sup> In this procedure mixed male and female gametes are placed in the Fallopian tube of a host mother.

Who should legally be the mother of the child? Should it be the ova donor, who is genetically linked to the child, the commissioning or intended mother, who is socially linked to the child, or the surrogate, who has a gestational (birth) link to the child?<sup>15</sup>

Where the *mater semper certa est* has previously provided certainty in this regard, this is no longer the case.

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14 See the discussion in chapter 1.

15 Lupton 1982 *Legal Consequences* 108; Schutte 1986 *Hervorming* 146 - 147 and 149 - 150.

Advances in modern birth technology have gained ground and in certain respects have caught the legal system unprepared. This is not only true of our country, but applies worldwide.

On 1 October 1987, the historic birth of the Tzaneen surrogate triplets focussed the country's attention on the relatively new procedure of surrogate motherhood. The triplets were carried by their married grandmother for her own daughter and son-in-law, who were also the genetic parents of the child. Apart from the public debate on the moral, ethical and religious issues involved, some important legal questions were raised prior to the birth of the triplets, namely:

- 1 who are the legal parents of the children, and
- 2 in whose name should they be registered?<sup>16</sup>

It was uncertain whether the *mater semper certa est* approach should apply in so unique a situation, since the gestational grandmother merely acted as a host mother with no direct genetic link with the children. Both Lupton<sup>17</sup> and Schutte<sup>18</sup> suggest that the application of the *mater semper certa est*

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16 Strauss S A "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 Intern L Pract 71.

17 1982 Legal Consequences 108.

18 1986 Hervorming 146 - 147 and 149 - 150.

would be inappropriate in such circumstances. It is submitted that this is the correct approach, since the triplets are undeniably the direct descendants of their genetic parents (the Ferreira-Jorges) and not of their grandparents. The registration of the children by the Registrar of Births, Marriages and Deaths in the name of their genetic parents was therefore in the best interest of all the parties.<sup>19</sup> It appears that the decision is in line with the traditional view that consanguinity determines legal parenthood. The genetic and not the gestational mother was therefore considered the legal mother of the child.

In recent years several jurisdictions<sup>20</sup> have responded hastily with legislation in an effort to clear up the uncertainty of motherhood created by modern birth technology and aggravated by an inconsistency in court decisions on this aspect.<sup>21</sup> In October 1987, approximately two weeks

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19 Strauss 1989 Intern L Prac 71; Strauss S A "Regstatus van K.I.-Kinders en Kinders Gebore Uit Surrogaatmoeders" 1988 S A Praktyksbestuur 5; Pretorius R 1988 DR 82.

20 For instance the USA, the UK and the Netherlands. See Anon "Surrogate Parenthood - An Analysis of the Problems and a Solution: Representation for the Child" 1985 Wm Mitchell L Rev 143 - 182 at 149 n 32 and 151 43 with regard to legislation in the USA; in the Britain Family Law Reform Act 1987 s 27(1) and in the Netherlands Burgerlijk Wetboek s 201.

21 See the discussion of Court Decisions in chapter 2.

after the birth of the Tzaneen triplets, the South African legislature followed suit with the enactment of the Children's Status Act<sup>22</sup> which was aimed at providing legitimacy to children who had previously been considered illegitimate. This Act followed the recommendations of the South African Law Commission in its report on this matter.<sup>23</sup>

Although the Act was aimed at improving the status of illegitimate children in general, only the section dealing with the status of children born by artificial insemination or in vitro fertilisation is discussed here as it is of particular relevance to surrogacy arrangements.

In s 5(1)(a) of the Act, the *naturae semper certa est* principle is legislatively entrenched in respect of the situation where the baby was conceived by artificial insemination or in vitro fertilisation. Surrogate motherhood falls within the ambit of this section as the definition of artificial insemination in the Human Tissue Act<sup>24</sup> and the

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22 82 of 1987, published in GG 10974 14-10-1987.

23 Project 38 October 1985.

24 65 of 1983 (as amended by Act 106 of 1984). See also s 27 of Act 51 of 1989 which replaced the term "insemination" in the English text with "fertilization".

Children's Status Act<sup>25</sup> is wide enough to cover in vitro fertilisation and transfer of the gamete/s to a surrogate mother.<sup>26</sup>

S 5(1)(a) of the Children's Status Act stipulates that the gestational or birth mother and her husband are the legal parents of the child. In most instances the husband's consent is a prerequisite for artificial insemination or in vitro fertilisation, although in terms of s 5(1)(a) of the Act, consent need not be in writing.<sup>27</sup> There is, however, a presumption that consent was given.<sup>28</sup> Section 5(2) of the Act provides for the termination of the rights, obligations and duties of the donors of semen and/or ova towards the child. A donor may, therefore not claim any parental rights to the child and the child will likewise not be able to claim maintenance from a donor, for example.

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25 S 5(3).

26 S 1.

27 See van der Walt L "Toestemming en die Vestiging van Ouerskap oor die Kunsmatig Verwekte Kind" 1987 Obiter 1 - 15, who suggests that informal consent could create numerous problems and that formal written consent is preferable.

28 S 5 (1)(a) and (b).



Since certainty on the aspect of legal motherhood is undeniably in the interest of the child, the effects of legislation such as the Children's Status Act on children born in surrogacy arrangements, can be very unfortunate. Full surrogacy (such as the Ferreira-Jorge's) is affected more drastically than partial surrogacy, since the parental rights and duties of both genetic parents are terminated, despite their pre-natal intent and desire to have the child. This is unfortunate as this form of surrogacy, provided it is non-commercial, seems to be morally more acceptable than partial surrogacy, where the genetic material is provided by the surrogate mother.

Legislation providing that the gestational mother is, the legal mother of the child in all forms of artificial insemination or in vitro fertilisation could lead to absurd results. The birth of the Tzaneen triplets preceded the Act by a mere thirteen days. Should the Children's Status Act for instance have been operative at the birth of the triplets, they would have been considered the legal children of their grandmother, Mrs Anthony and the brothers and sister of their own genetic mother.<sup>29</sup>

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29 Strauss S A 1989 Intern L Prac 61 - 88; Pretorius R 1988 DR 81 - 82.

As the Act was not intended to regulate surrogacy, it is not surprising that it takes no cognisance of the intent of the parties to a surrogacy arrangement. Since the Act is, however, applicable to surrogacy, it seems unfair and unnatural to impose parenthood on a surrogate mother and her husband who have entered into the agreement for non-commercial reasons and certainly not to keep the child for themselves. It is furthermore unjust that a child should suffer negative consequences merely because the parents decided to utilise the option of surrogate motherhood.

In the Warnock Report in Britain,<sup>30</sup> it was conceded that private surrogacy agreements will continue to exist despite legislation prohibiting some forms of surrogacy.<sup>31</sup> It was suggested that in the (rare) instances of a baby being handed over to the intended parents in accordance with the agreement, adoption laws could be made more flexible to facilitate adoption by the genetic mother in cases of full surrogacy.<sup>32</sup> This is a sensible approach to the problem and one which should also be considered in South Africa.

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30 On Human Fertilisation and Embryology 1984, discussed in chapter 2 under British Reports.

31 At 8.19 of the Report.

32 At 8.20 of the Report.

In the only reported case which could be traced dealing with the question of motherhood in full surrogacy, a lower Michigan court held in *Smith v Jones*<sup>33</sup> that the woman who provides the ova - the genetic mother - is the legal mother of the child and not the gestational or birth mother.

The most pressing question in this regard is whether one should allow some forms of surrogacy while prohibiting others. As a Bill of Rights is envisaged for South Africa in the near future, this question is more complex than under the present constitutional system. It could be regarded as discriminatory to permit some women the option of surrogate motherhood while denying others this option.<sup>34</sup>

Public policy in South Africa is undoubtedly in favour of restricting surrogate motherhood to married couples in a

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33 85-532014 DZ 3rd Jud Dist Mich (14 March 1986), discussed in chapter 2 and cited by Eaton T A "Comparative Responses to Surrogate Motherhood" 1986 Neb L Rev 686 - 727 at 69, n 10 and 695 n 34, 723 and 724 n 156, first reported by Annas G J "The Baby Broker Boom" 1986 Hastings Center Rept 30.

34 "Reproductive Technology and the Procreation Rights of the Unmarried" 1985 Harv L Rev 669 - 685; Kritchevsky B "The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family" 1981 Harv Womens' L J 1 - 41; Wikler N J "Society's Response to the New Reproductive Technologies: The Feminist Perspectives" 1986 S Cal L Rev 1043 - 1057.

stable relationship,<sup>35</sup> which is, to my mind, the correct view.<sup>36</sup> It must, however be borne in mind that it creates an anomaly to allow single people to adopt children in terms of the Child Care Act,<sup>37</sup> but to refuse them the option of artificial insemination.

Following the birth in South Africa of the Tzaneen triplets, the predominant opinion seems to be that full surrogacy in a family arrangement without any commercial gain for any of the parties, is generally acceptable.<sup>38</sup>

It is doubtful whether a South African court will invariably order specific performance of the terms of a surrogacy contract.<sup>39</sup> Should the surrogate mother refuse to hand over the baby in terms of the contract, the court may consider the contract void on grounds of public policy. The court may nevertheless decide to enforce those parts of the contract

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35 See the 1985 South African Law Commission's Report 133 where it is clearly stated that artificial insemination of unmarried women is unacceptable. See also Lupton 1982 Legal Consequences 377.

36 See the Recommendations in chapter 7.

37 S 17(b).

38 See the discussion in chapters 3 and 4.

39 See the discussion in chapter 3.

which are in the best interest of the child<sup>40</sup> and is, furthermore empowered to grant the intended parents guardianship, if this is in the child's best interest.<sup>41</sup> It is submitted that the uncertainty in this regard should be cleared up by direct legislation.<sup>42</sup> There is no reason to regard non-commercial surrogacy as a threat to society, since it contains a "self-limiting" factor. Very few women would be prepared to undertake the risks of pregnancy for purely altruistic reasons, but the few who are willing to do so, should not be prevented from making their own decisions in this regard - as long as these are informed decisions.<sup>43</sup>

The legislature should also reconsider the legal position of surrogate children.<sup>44</sup> To place (indirect) legislative obstacles in the way as a deterrent to those who wish to utilise surrogate motherhood is unrealistic and unsatisfactory.

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40 See chapter 3 under The Doctrine of Severability and the Relevance of Restraint of Trade Agreements to Surrogacy.

41 See chapter 3 under Specific Performance in South Africa.

42 See the Recommendations in chapter 7.

43 See chapter 6 under Informed Consent.

44 See the Recommendations in chapter 7.

### 2.1.1 CONSANGUINITY AND MOTHERHOOD

In South Africa the criterion for determining legal parenthood has always been consanguinity. Statutory provisions allow for exceptions in certain circumstances, for instance adoption, where the courts are empowered to terminate the parental rights of the genetic parents. The Supreme Court as upper guardian of all minors is also in a position to terminate parental power in special circumstances and if it is in the best interest of the child.<sup>45</sup>

If consanguinity is applied strictly to determine motherhood, the genetic mother would be favoured as the legal mother of the child.<sup>46</sup> Prior to the enactment of the Children's Status Act this approach would have been favourable for the intended parents in full surrogacy, since they are undeniably the genetic parents of the child and the children their direct (genetic) descendants.

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45 See *infra* under the Role of the Supreme Court as Upper Guardian of All Minors.

46 1985 S A Law Commission Report 127; Lupton 1982 Legal Consequences 98; Pretorius 1987 DR 273.

In the first two surrogacy cases in Britain, the genetic link between the parents and the child was not accorded much significance.<sup>47</sup> Montgomery states in this regard: "Parental rights exist in order to promote the function of bringing up a child. The blood tie does not guarantee that this function will be well performed." In both instances the courts preferred to adopt a functionalist approach with the interest of the child as paramount criterion.<sup>48</sup>

With regard to paternity, the consanguinity criterion has been questioned by several writers,<sup>49</sup> since strict adherence may lead to impractical results. The same is true of maternity. To consider an ova donor, for instance, as the legal mother of the child merely because she provides the genetic material, would not serve the child's best interest. Consanguinity as a criterion for legal parenthood has been questioned by some writers.<sup>50</sup> Thomas, after a careful analysis of the Roman and Roman Dutch Law, concludes that

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47 Montgomery J "Constructing A Family - After A Surrogate Birth" 1986 Mod L Rev 637.

48 1986 Mod L Rev 638.

49 Thomas Ph J "Paternity: Legal or Biological Concept?" 1988 SALJ 239 - 248; Jordaan R "Biologiese Vaderskap: Moet dit Altyd Seëvier? F v L 1987 4 SA 525 (W)" 1988 THRHR 392 - 398.

50 Thomas *ibid*; Jordaan *ibid*.

paternity is (for instance) a legal and not a biological concept. This is, to my mind, an interesting statement as there are undoubtedly a large number of children whose legal fathers are not necessarily their biological fathers. If suitable parents desire parental rights towards a child, it would be detrimental to award such rights to a couple or a mother who does not want them. We have reached a stage where the consanguinity criterion as well as the *mater semper certa est* approach should be reconsidered,<sup>51</sup> especially in surrogacy. Any Act purporting to deal with artificial procreation and adoption should also contain a clear definition of "mother".

Several courts in foreign jurisdictions have been faced with legal actions occasioned by the so-called "do-it-yourself" artificial inseminations.<sup>52</sup> Some unmarried women, or even those involved in Lesbian relationships, may prefer this option. Such an incident reached newspaper headlines in our

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51 See in this regard Stumpf A "Redefining Mother: A Legal Matrix for New Reproductive Technologies" 1986 Yale L J197.

52 See the Recommendations in this regard in chapter 7. See also Garrison M "Surrogate Parenting: What Should Legislatures Do?" 1988 Fam L Q Special Issue on Surrogacy 151 with reference to the cases *C M v C C* 170 N J Super 586 407A 2d 849 (1979); *Jhordan C v Mary K* 179 Cal App 3d 386 224 Cal Rptr 530 (1986).



own country recently.<sup>53</sup> As neither the Regulations in terms of the Human Tissue Act, nor the Children's Status Act, addresses the situation of an unmarried woman's artificial insemination - apart from a blanket prohibition in terms of the former Regulations - uncertainty remains in this regard.<sup>54</sup> Can such a woman, for instance, claim maintenance from the donor of the semen?<sup>55</sup>

Private surrogate motherhood arrangements will always be a reality despite any legislation prohibiting some or all forms of surrogacy. In my view, one should rather strive to protect the interests of children at all costs. If a total prohibition were to be placed on all forms of surrogacy, it is not unlikely that "do-it-yourself" arrangements would be encouraged. This will leave the parties without the benefit of professional help and counselling.<sup>56</sup> It is submitted that minimal regulation could provide better protection for children who may face legal uncertainty with regard to the

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53 Sunday Times 13-03-1988. See also chapter 7 under Limiting "Self-Inseminations".

54 The effect of this omission in legislation is discussed in greater detail under Legitimacy *infra*.

55 It is hardly conceivable that a court of law would order the donor to pay maintenance in such a situation.

56 Wright M "Surrogacy and Adoption: Problems and Possibilities" 1986 Fam L 109.

identity of and legal relationship to their parents. The Children's Status Act, should preferably be amended to provide for the legitimacy of children born as a result of surrogacy agreements.<sup>57</sup>

## 2.2 PATER IS EST QUEM NUPTIAE DEMONSTRANT

The presumption of paternity is embodied in the maxim *pater is est quem nuptiae demonstrant*: "the father is he to whom the marriage points". Thus a child born to or conceived by a married woman is considered legitimate and there is a presumption that the woman's husband is the father of the child.<sup>58</sup> It is not necessary for conception to have taken place during the subsistence of the marriage, nor is it necessary that the children are conceived from the husband of the mother. The prerequisite is however the subsistence of a marriage. The fact that a child is conceived with the assistance of modern birth technology, such as in vitro

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57 See the Recommendations in chapter 7.

58 Grotius 1 12 3; Voet 1 6 6; Boberg P Q R 1977 *The Law of Persons and the Family* 323 and 323 n 16; Hahlo H R and Kahn E 1960 *The Union of South Africa: The Development of its Laws and Constitution* 352 - 353; Hoffmann L H and Zeffertt D 1981 *The South African Law of Evidence* 424; Lupton M L "The Status of Children Born by Artificial Insemination in South African Law" 1985 TSAR 282 - 283; Spiro E 1985 *Law of Parent and Child* 20 - 22; Van den Vyver J D and Joubert D J 1985 *Persone- en Familiereg* 181.

fertilisation, should make no difference to the presumption. Prior to the Children's Status Act an interesting question which could have been raised is whether the marriage referred to is that of the surrogate and her husband or that of the intended parents? Especially in full surrogacy where the genetic material is provided by the intended parents and the surrogate mother merely acts as a host mother, the argument could have been raised that the child is conceived during the subsistence of the intended parents' marriage and is therefore their legitimate child.<sup>59</sup>

Several writers<sup>60</sup> are of the opinion that the presumption of paternity is rebuttable by any interested party.<sup>61</sup> Others<sup>62</sup> restrict this privilege to the mother and her husband, or in some instances, to the husband alone. In *F v L*<sup>63</sup> Harms J refused an application by X to be declared the legal father of the child where the mother, despite her admission of

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59 See the discussion under Legitimacy *infra*.

60 Spiro E "Legitimate and Illegitimate Children" 1964 *Acta Juridica* 57 - 58; Jordaan 1988 *THRHR* 392 - 398.

61 Cronjé D S P 1990 Barnard Cronjé and Olivier - *Die Suid-Afrikaanse Persone- en Familiereg* 63; Spiro 1985 *Law of Parent and Child* 21; Jordaan 1988 *THRHR* 395.

62 Van den Vyver and Joubert 1985 *Persone- en Familiereg* 207.

63 1987 4 SA 525 W.

having had intercourse with both X and the other man (her present husband) at a time when conception was possible, married another man, after her relationship with X.<sup>64</sup>

The *pater is est quem* presumption may be rebutted at any stage on a balance of probabilities.<sup>65</sup> The presumed state of affairs exists *nisi contrarium evidenter constiterit*. In other words, the facts are accepted as being proved unless and until there is a rebuttal.<sup>66</sup>

### 3 THE EFFECT OF THE TERMINATION OF PARENTAL RIGHTS OF GAMETE DONORS IN S 5 OF THE CHILDREN'S STATUS ACT ON SURROGACY

The entrenchment of the *pater is est quem* presumption in the Children's Status Act, has provided an additional obstacle to surrogacy arrangements. The result - that the surrogate and her husband are considered the legal parents of the child - is contrary to the expectations and intention of all the parties to the agreement. A man, who has played a minor role in the proceedings, is awarded the parental rights and duties to a child, while the rights and duties of the

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64 Jordaan 1988 THRHR 392 - 398; Boberg P Q R "The Would Be Father" 1988 *Businessman's Law* 112 - 115.

65 Van Lutterveld v Engels 1959 2 SA 699 AD.

66 Voet 1 6 6 and 7 quoted by Spiro 1985 *Law of Parent and Child* 21.

genetic parent/s are terminated. This result seems unjust and unreasonable. To award paternal rights to a man who does not want a child and who, in any event, played a minor role in the agreement, can surely not serve the best interest of the child. Should the surrogate mother hand the child over to the intended parents after birth, her husband's consent is furthermore a prerequisite for adoption by the intended parents. It would seem unreasonable that the surrogate's husband, who is not the biological father of the child, should be in so strong a position to hinder an adoption by the intended parents if all the other parties have consented to adoption.

If one accepts that any interested party is in a position to rebut the presumption of paternity, it would have been possible for the commissioning father to do so before 15 October 1987, when the Children's Status Act became operative.<sup>67</sup> This is, however, no longer the case. His position is equated with that of a sperm donor and his rights towards his natural offspring are terminated by s 5(2)(a) of the Act. Although it is in the child's best

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67 The date of publication in the Government Gazette is normally the date on which a statute become effective, unless a clear stipulation in the Act provides otherwise. See s 13 of the Interpretation Act 33 of 1957 and Steyn L C 1981 Die Uitleg van Wette 180.

interest that the rights of a sperm donor be terminated,<sup>68</sup> the effect is unreasonable for a commissioning father in surrogate motherhood. Since he may no longer be in a position to rebut the presumption of paternity, he is in peril of losing his child.

It appears that, at present, the only available option would be for the intended parents to adopt the child, provided that the required consent is obtained from the surrogate and her husband.<sup>69</sup> Unfortunately the requirements for adoption as set out in s 17 of the Child Care Act<sup>70</sup> place another legislative obstacle in their way. Unlike its predecessor, the Children's Act<sup>71</sup>, which contained no prohibition in this regard, s 17 of the Child Care Act seemingly prevents a biological parent from adopting his/her own child. S 17(a) prevents the adoption of a child if the child is "born of one of them". A child may, however, be adopted by a married

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68 The termination of parental power safeguards donors against later claims, for instance, maintenance.

69 Subsections 18(4)(d) and (e) of the Child Care Act 74 of 1983 require that the consent to adoption be given by both parents of the child if he/she is legitimate, or by the mother of the child if he/she is illegitimate and by the child if he/she is older than ten years and understands the nature and import (sic) of consent.

70 74 of 1983.

71 33 of 1960.

person of whose spouse the child is born - a typical stepparent adoption.<sup>72</sup> The question that needs to be answered is whether the child born as a result of a surrogacy arrangement is a child "born of one of them". Does this refer to the act of birth or the genetic link between the child and its parents? Since a man is unable to give birth, it *prima facie* refers to the genetic link. This is strengthened by the wording of s 17(b) which permits a widower/widow or an unmarried/divorced person to adopt a child with the consent of the Minister if "the child is not a child born of him or her". On the other hand the argument could be raised that since the natural father's parental rights were (legislatively) severed by s 5(2) of the Children's Status Act there is no link whatsoever between him and the child and therefore no obstacle to the adoption of the child. The uncertainty created by the combined effect of the Children's Status Act and the Child Care Act demands the urgent attention of the legislature. This aspect is dealt with in chapter 7.

Before turning to the power of the Supreme Court as upper guardian of all minors, the concept of parental power and an agreement to transfer parental power should be examined.

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72 S 17(c).

#### 4 PARENTAL POWER

##### 4.1 INTRODUCTION

The content of parental power is complex and involves the authority as well as the rights and duties of parents in respect of their minor children arising out of parentage.<sup>73</sup> It is sometimes also referred to as natural guardianship.<sup>74</sup> Cronjé<sup>75</sup> refers to the relationship between parent and child as a *consortium omnis minoritatis* and mentions several ways in which this relationship is protected from infringement by others.<sup>76</sup>

While both parents are alive, parental power vests in both unless the child is illegitimate, in which case it will vest

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73 Spiro 1985 *Law of Law of Parent and Child* 42 - 43.

74 Spiro 1985 *Law of Law of Parent and Child* 39.

75 Barnard, Cronjé and Olivier 1990 *Die Suid-Afrikaanse Persone- en Familiereg* 365.

76 For instance the possibility of obtaining an interdict to prevent a third party from getting in touch with a minor child as acknowledged in several cases. See Meyer v Van Niekirk 1976 1 SA 252 T; Coetzee v Meintjies 1976 1 SA 257 T; Gordon v Barnard 1977 1 SA 887 C; H v I 1985 3 SA 237 C. There are also several criminal offences to protect the relationship between a parent and child, for instance, abduction. See S v F 1983 1 SA 747 O; S v Hoffman 1983 4 SA 564 T.



only in the genetic/birth mother of the child.<sup>77</sup> Spiro suggests that the power is not equal,<sup>78</sup> in that the father's authority is superior to that of the mother.<sup>79</sup>

#### 4.2 AGREEMENT TO TRANSFER PARENTAL POWER

##### 4.2.1 GREAT BRITAIN

Bromley and Lowe<sup>80</sup> prefer to refer to "parental authority and responsibility", which is probably a better description than "parental rights" or "parental power" since it emphasises the two major aspects of parental power - rights and duties.

In Britain, the parent of a child may not conclude an agreement to transfer parental power permanently to another

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77 According to the philosophy: "Eene moeder maakt geen bastaard" Boberg P Q R 1977 *The Law of Persons and the Family* 333; Spiro 1985 *Law of Parent and Child* 41 450; *Dhanabakium v Subramanian* 1943 AD 160 166.

78 1985 *Law of Parent and Child* 41; *Landman v Mienie* 1944 OPD 59 62.

79 *Van Rooyen v Werner* 1892 9 SC 425, 429 as interpreted by Tindall J A in *Calitz v Calitz* 1939 AD 56 62 - 63; *Fisher v Fisher* 1956 1 PH B12 SR quoted by Spiro 1985 *Law of Parent and Child* 40 n 25.

80 Bromley P M and Lowe N V 1987 *Bromley's Family Law* 254 et seq.

or to relinquish it as such an agreement is contrary to public policy and therefore void.<sup>81</sup> Eaton<sup>82</sup> in a comparative analysis of the British and American response to surrogate motherhood, concludes that courts in the United Kingdom are more stringent in declaring agreements to transfer parental power void, as a violation of public policy, than is the case in the United States. The restriction on the transfer of parental power is statutorily entrenched in Britain,<sup>83</sup> with the exception of agreements in respect of children when the parents are contemplating separation during their marriage.<sup>84</sup> Such agreements were only valid whilst the parties were married and the court had a discretion in enforcing them with due regard to the best interest of the child.<sup>85</sup> Bromley discusses the situation prior to the coming into operation of the Family Law Reform

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81 1987 Bromley's Fam Law 264 and 264 n 6 with reference to *Vansittard v Vansittard* 1858 2 De G & J 249; *Walrond v Walrond* 1858 John 18 and *Humphrys v Polak* 1901 2 KB 385, CA. See also Cusine D J "Womb-Leasing: Some Legal Implications" 1987 New L J 824 - 825.

82 "The British Response to Surrogate Motherhood: An American Critique" 1985 Law Teacher 169.

83 S 1(2) of the Guardianship Act 1973; s 85(2) of the Children Act 1975 which prevents anyone (whether or not a parent) from transferring parental rights to another.

84 1987 Bromley's Fam Law 264.

85 1987 Bromley's Fam Law 265.

Act of 1987, where, in terms of the proposed s 3, the exception mentioned above was to be broadened. It was recommended that in terms of the Act, "(a)ll<sup>86</sup> mothers and fathers, whether or not they have ever been married and even if they are divorced, should be able to conclude binding agreements as to the exercise by either of them, at any time when they are not living together in the same household, of any of the parental rights and duties with respect to the child..."<sup>87</sup>. The court, however, would still have a discretion to refuse the enforcement of such an agreement if it is not in the child's interest. This section deals with binding agreements to the exercise of parental power of parents in general. In terms of this section, parents who are not married to each other may, subject to the court's discretion, conclude binding agreements regarding parental rights and who should exercise them - an aspect which could have had an important effect on transfer of parental power in surrogacy arrangements. Subsequently, however, a new s 1(2) of the Guardianship Act of 1973 was enacted. This section provides that the parents (father and mother) may agree actually to transfer or to surrender their parental

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86 My emphasis.

87 1987 Bromley's Fam Law 264 - 265. See also Montgomery J "Assisted Reproduction after the Family Law Reform Act 1987" 1988 Fam L 24.

rights and duties - but only amongst themselves, when they are living apart.<sup>88</sup>

#### 4.2.2 SOUTH AFRICA

The situation in South Africa is similar to that in Britain.<sup>89</sup> An agreement permanently to transfer parental is considered contra bonos mores.<sup>90</sup> Parental power or incidents thereof may be transferred by the courts only if it is justified by the circumstances, or if the courts are empowered to do so under certain statutory provisions such as the Matrimonial Affairs Act<sup>91</sup> or the Child Care Act.<sup>92</sup> A distinction should, therefore be drawn between the common law and the statutory power, respectively, of the courts to transfer parental rights or to deprive a parent of such rights.

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88 Stevens R and Legge A "'Illegitimacy Obscured but not Obliterated' An Analysis of the Family Law Reform Act 1987" 1987 Fam Law 409 - 413.

89 Spiro 1985 Law of Parent and Child 43.

90 Van der Westhuizen v Van Wyk 1952 2 SA 119 GW; Ex parte van Dam 1973 2 SA 182 W. See also the discussion under the Boni Mores in chapter 3.

91 37 of 1953.

92 74 of 1983.

The Supreme Court, may, in its capacity as upper guardian of all minors, deprive a parent of all or incidents of his/her parental power (guardianship) over a child.<sup>93</sup> If a parent is not fit to have custody of a child, it may also be awarded to a third person.<sup>94</sup> As a result of the far-reaching effects such a decision may have, the Supreme Court will exercise this power cautiously and only in protection of the interests of the child.<sup>95</sup>

##### **5 THE ROLE OF THE SUPREME COURT AS UPPER GUARDIAN OF ALL MINORS**

It seems that should the court refuse adoption on the ground that adoption of a child by a genetic parent is not permitted in terms of the Child Care Act,<sup>96</sup> the only alternative for the commissioning couple would be to approach the Supreme Court as upper guardian of all minors

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93 See the discussion *supra*.

94 Spiro 1985 Law of Parent and Child 263.

95 Calitz v Calitz 1939 AD 56 63 - 64; Blume v van Zyl and Another 1945 CPD 48; Bam v Bhabha 1947 4 SA 798 AD 806 809; Spence-Liversedge v Byrne 1947 1 SA 192 N; Short v Naisby 1955 3 SA 572 D 575 B; Goodrich v Botha and Another 1952 4 SA 175 T 180 F.

96 74 of 1983. For a discussion of s 17 of the Child Care Act, see Eckard M M M Geldigheidsvereistes in Kinderhofondersoeke by Versorgingsverrigtinge ingevolge Artikel 13 en Aannemingsaansoeke ingevolge Artikel 18 van die Wet op Kindersorg 74 van 1983 LL M Unisa 1988 163 et seq.

for an order terminating the parental power of the surrogate and her husband, accorded them by the Children's Status Act, and conferring guardianship upon the commissioning couple. The Court has the power to do so in certain circumstances, on special grounds, and when it is in the best interest of the child.<sup>97</sup>

In *Short v Naisby*<sup>98</sup> Henochsberg J made the following statement with reference to a number of previous cases:<sup>99</sup>

"It seems to me, however, that the Court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but those are not the only grounds on which a Court will interfere. Good cause must be

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97 *Calitz v Calitz* supra at 63 and 64; *Goodrich v Botha and Another* supra 180 F where Roper J states:  
 "It is clear that in South Africa the upper guardianship once exercised by the Courts of Holland is vested in the Supreme Court, and in 1911 in the case of *Oliver v Hugo*, the Cape Provincial Division in its capacity as upper guardian, made an order for the personal custody of a minor orphan ...".

98 1955 3 SA 572 D 575 B.

99 *Woods v Woods* 1922 NPD 267; *Calitz v Calitz* supra; *Lynch v Lynch* 1946 OPD 85 at 95; *Bam v Bhabha* supra at 809; *Spence-Liversedge v Byrne* supra and *Blume v Van Zyl and Another* supra .

shown before a Court will interfere, but good cause is not capable of precise definition. Each case must, therefore, be considered on its merits."<sup>100</sup>

This view was reiterated more recently in *Petersen en 'n Ander v Kruger en 'n Ander*.<sup>101</sup> In this unusual case, two boys were, erroneously<sup>102</sup> switched in a maternity ward in a particularly unfortunate incident. Gradually differences between the child they had received and their other children, became more obvious to the Petersens. They tried to establish contact with the Krugers, but the latter were not in favour of returning the child they had received. Blood tests, however, confirmed the suspicion that a switch had indeed occurred and the court was placed in the unenviable position of deciding whether the Petersens could have their child returned to them. They were also willing to maintain custody of the Kruger's child if the latter did not want him. The court carefully considered several important issues, for instance the rights and duties of natural

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100 My emphasis.

101 1975 4 SA 171 C.

102 From the facts of the case and the court's reaction to the incident, it appears that the personnel acted negligently. The court pointed out that more discretion on their part could have saved several people considerable pain - 172 H.

(genetic) parents towards their children, the best interest of the child and the role of the Supreme Court as upper guardian of all minors. In a sensible and sensitive decision, the court granted the Petersens their application on the ground that it would not be detrimental to the child's physical, moral or psychological welfare if he were to be returned to his genetic parents (although the respondents were also perfectly acceptable custodians).

This case is testimony to the competence of our courts to handle complex and sensitive family matters. Although the court acknowledged the welfare of the child as the paramount consideration, it nevertheless also considered the rights of the parties as an important factor in reaching its decision.<sup>103</sup> The competence of the family to provide a secure home (on material, moral, psychological and religious grounds) had to be established. The possible immediate and long-term effects of the decision were also considered,<sup>104</sup> although that was, according to the court, not an easy task.<sup>105</sup>

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103 174 B.

104 174 D.

105 174 H.



# **5.1 GUARDIANSHIP<sup>106</sup> (OR CUSTODY) AWARDS AND THE ISSUE OF PARENTAL PREFERENCE**

From Petersons case<sup>107</sup> it is clear that the welfare of the child is the paramount criterion in guardianship cases, but the suitability of the parents must also be considered.<sup>108</sup>

In most surrogacy arrangements, should a dispute regarding custody or guardianship arise, it will be between parents and non-parents of the child. Here, again, the suitability of the parents is of the utmost importance. Several possibilities regarding the litigants exist. They could be:

1        a commissioning couple whose gametes were used for artificial insemination or in vitro fertilisation - thus there is a genetic link from both parents with the child (full surrogacy) and no genetic link with the surrogate and her husband. In terms of the Children's Status Act the surrogate and her husband are considered the legal parents of the child.

2        A commissioning couple where gametes of either the

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106 Parental power is sometimes also referred to as "sole guardianship" or "natural guardianship" Spiro 1985 Law of Parent and Child 47 and 337.

107 Supra.

108 174 B and 176 A with reference to the British case Re R (M) (an infant) 1966 3 All ER 58 Ch D.

husband or the wife were used - thus there is a genetic link between one parent (husband or wife) and the child. A genetic link exists between the child and surrogate and in terms of the Children's Status Act, the surrogate and her husband are also considered the legal parents of the child.

- 3 A commissioning couple with no genetic link to the child, for instance where donor sperm is used and the child is carried by a surrogate mother whose own ova are used. The surrogate and her husband are considered the legal parents of the child.

Although the Children's Status Act provides that the woman giving birth and her husband are the legal parents of the child, this situation is far from ideal in surrogate motherhood. In common law a court faced with a guardianship or custody suit between genetic and non-genetic parents would undoubtedly have considered the parental status of the litigants towards the child. This brings one to the issue of so-called "parental preference".<sup>109</sup>

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109 Russell I "Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts" 1988 - 1989 J Fam L 620.

Although parental preference is generally encountered in divorce proceedings where a court must determine the guardianship or custody of children, it also features prominently in surrogate motherhood, as was clearly illustrated by the the Baby M cases in New Jersey. The New Jersey Supreme Court treated the issue as a custody dispute. In both cases (Baby M I and II)<sup>110</sup> express references are encountered in support of the best interest of the child criterion as the controlling issue in determining who should have custody.<sup>111</sup> Russell,<sup>112</sup> however, points out that neither of these courts acknowledged the significance of the classification of parental status in application of the best interest test. In other words, the courts did not expressly examine the parental status of the litigants.<sup>113</sup> It therefore appears that the welfare of the child was the more important consideration. The trial court in Baby M I held that Mary Beth Whitehead was a fit parent but that she would

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110 In re Baby M 217 N J Super 313 323 525 A 2d 1128 1132 Ch Div (1987) rev'd in part, 109 N J 396, 537 A 2d 1227 (1988).

111 Russell 1988 - 1989 J Fam L 616 n 98 and references cited.

112 1988 - 1989 J Fam L 616.

113 In Britain the tie of fatherhood has influenced the courts in determining custody under certain circumstances. See Wright M "Surrogacy and Adoption: Problems and Possibilities" 1986 Fam Law 110 - 111 and the cases cited.

not be the best parent for the child.<sup>114</sup> The Supreme Court, in the (Baby M II) case, treated it as a custody dispute between the genetic parents, William Stern (commissioning father)<sup>115</sup> and Mary Beth Whitehead (surrogate mother), without any notable preference for either.

The courts of England are not consistent in their treatment of this aspect.<sup>116</sup> The facts of the cases discussed below<sup>117</sup> differed considerably which may also have contributed to the inconsistency. In *A v C*,<sup>118</sup> a case of partial surrogacy, the surrogate refused to hand the child over to the genetic father. Although this arrangement took place in 1978, it was only reported in 1985, when surrogacy became recognised as a possible alternative to adoption. The court, in condemning the arrangement, ordered that the child remain a ward of court until majority or further order and that care and control be granted to the surrogate mother of the child as this would be in the child's best interest. On appeal the genetic father was even denied access to the child as the

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114 See Russell 1988 - 1989 J Fam L 619 and n 109.

115 Russell 1988 - 1989 J Fam L 617 with reference to Baby M (II) 109 N J at 453, 537 A 2d at 1256.

116 See chapter 2 under Court Decisions.

117 Ibid.

118 Ibid.

court found that there would be no advantage for the child to maintain contact with the father. The biological bond was insufficient to found such an order. The court found that the father acted in a selfish and irresponsible manner and that the mother should be allowed to carry on with her life without interference from him.

With reference to *J v C*<sup>119</sup> the court emphasised that "(t)he first and paramount consideration was the welfare of the child, bearing in mind, of course, the wishes and feelings and so on of the respective parents and other people concerned with the child, but always bearing in mind that the decision must rest in terms of the best interests of the child, having taken all these other factors into account".

In the *Baby Cotton* case in 1985<sup>120</sup>, the surrogate, Kim Cotton was willing to hand the child over to the intended parents. The couple wanted permission to take the baby home with them to the USA. In this case the commissioning couple were qualified professionals who were, according to the judge, excellently equipped to meet the baby's emotional and

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119 (1970) AC 668 in the House of Lords.

120 See chapter 2 under Court Decisions.

financial needs and he rejected the notion that they were unsuitable as parents merely because they had entered into a surrogacy agreement.<sup>121</sup> Custody was granted to the natural father as it was considered to be in the child's best interest.

In June 1987 *In re Adoption Application (payment for adoption)*<sup>122</sup> was heard by Latey J. In this case the main question was whether payments made to a surrogate constitute payment for adoption, which is unlawful in terms of s 50(1) the Adoption Act 1958 (as amended) and if so, whether the court could authorise the payments made under s 50(3) of the Act. The court, after careful consideration, found that adoption of the child by the intended parents was in its best interest and that the arrangement was one of trust which had been fully honoured on both sides. The court did not consider compensation for basic expenses a commercial transaction since it did not constitute a reward.<sup>123</sup>

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121 At 848 - 849 of the report.

122 See chapter 2 under Court Decisions.

123 Ibid.

In Germany<sup>124</sup> two courts have had the opportunity of ruling on surrogacy related issues. Although the contracts were declared void, custody was awarded to the surrogate mother in the one instance. In the other, where the father turned out to be the surrogate's husband, the court ordered repayment to the intended father.<sup>125</sup>

Although we have no judicial precedents on the issue of custody in surrogacy in South Africa, it appears from early case law that the courts seemed to favour the father as custodian of legitimate children.<sup>126</sup> Boberg<sup>127</sup> draws a distinction between the situation where the couple are living together (no divorce or judicial separation) and where the parents are divorced or judicially separated. In

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124 See chapter 2. See also Garrison M "Surrogate Parenting: What Should Legislatures Do?" 1988 Fam L Q 158 - 159 n 38 who mentions these cases, without discussing them; Feinerman J V "A Comparative Look at Surrogacy" 1988 Geo L J 1841 also refers to a court case in Germany in which it was stated that commercial surrogacy arrangements violate adoption law as well as "basic moral principles". The only reference provided is an article which appeared in the N Y Times 07-01-1988 "German Court Shuts Center for Surrogate Motherhood".

125 Garrison with reference to News Notes 1987 Fam L Rep BNA 1260.

126 Van Rooyen v Werner 1892 9 SC 425; Calitz v Calitz supra 56 at 61.

127 1977 The Law of Persons and the Family 412 460.

the latter case, the father has no better claim than the mother and the best interest of the child is always paramount, prevailing over all other considerations.<sup>128</sup> The present tendency seems towards an equal treatment of the parents in custody suits. When, for instance, a custody order is made in terms of s 6 of the Divorce Act<sup>129</sup> or s 5 of the Matrimonial Affairs Act<sup>130</sup> parents are, theoretically at least, treated equally.<sup>131</sup> According to Boberg,<sup>132</sup> there remains a tendency to allow a father to retain guardianship, irrespective of whether custody is awarded to the mother. Hahlo<sup>133</sup> in discussing this issue and citing several cases, is of the opinion that the mother will be awarded

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128 Boberg 1977 *Law of Persons and the Family* 416 - 417 with reference to *Fletcher v Fletcher* 1948 1 SA 130 AD and the cases cited in 417 n 13; Spiro 1985 *Law of Parent and Child* 285.

129 70 of 1979.

130 37 of 1953.

131 Heaton J *The Meaning of the Concept "Best Interest of the Child" as Applied in Adoption Applications in South African Law* LL M Unisa 1988 8 n 33.

132 1977 *Parent and Child* 420 citing *Fletcher v Fletcher* *supra*.

133 1985 *Law of Husband and Wife* 462 - 463 in discussing this issue and citing several cases, is of the opinion that the mother will only be awarded guardianship under exceptional circumstances. These include an irresponsible father who fails to perform his functions as guardian properly or one who is about to leave the country. See also Boberg 1977 *Law of Persons and the Family* 426 n 43 and the cases cited.



guardianship under exceptional circumstances only. These include an irresponsible father who fails to perform his obligations as guardian properly,<sup>134</sup> one who assaults his wife,<sup>135</sup> who drinks excessively,<sup>136</sup> has promiscuous habits<sup>137</sup> or who is about to or might leave the country.<sup>138</sup>

Here again, one should bear in mind that the introduction of a Bill of Rights into South African law could have a significant influence on the proceedings as there should be no discrimination based on gender.

## 5.2 BEST INTEREST OF THE CHILD

### 5.2.1 BACKGROUND

Although several references have been made to the "best interest of the child", the precise meaning has, as yet, not been considered.

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134 *Hornby v Hornby* 1954 1 SA 498 O at 500 E; *Van Aswegen v Van Aswegen* 1954 1 SA 496 O.

135 *Van den Berg v Van den Berg* 1959 4 SA 259 W.

136 *Walkinshaw v Walkinshaw* 1971 1 SA 148 NC.

137 *Walkinshaw supra*; *Leibrandt v Leibrandt* 1946 2 PH B 78 N.

138 *Leibrandt supra*; *Williams v Williams* 1946 CPD 49  
*Dempster v Dempster* 1953 4 SA 515 N.

The best interest of the child is to a large extent linked to the perception in society of the nature and meaning of the family and family relations.<sup>139</sup>

From being within the absolute power (*patria potestas*) of the *paterfamilias* in Roman law,<sup>140</sup> children gradually gained acceptance as having some "rights".

During the seventeenth and eighteenth centuries children were accorded a more important role as human beings in need of protection. Concern for their development, especially in the field of education, health and hygiene was paramount and during the eighteenth century their emotional welfare also became an important issue.<sup>141</sup>

#### 5.2.2 MEANING OF THE "BEST INTEREST OF THE CHILD"

In a purely literal sense, the meaning seems to be self-evident. Whatever is to the advantage, benefit or gain of a child is in its "best interest". A precise definition

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139 Heaton 1988 Best Interest 4.

140 Dannenbring 1980 Roman Private Law 304 et seq; Van Zyl D H 1977 Romeinse Privaatreg 81 et seq; Thomas Ph J 1980 Essentialia van die Romeinse Reg 161 165.

141 Heaton 1988 Best Interest 7 with reference to Maidment S 1984 Child Custody and Divorce 91 - 92.

of the "best interest" of the child, however, remains elusive. As Heaton<sup>142</sup> points out, the problematic aspect of the concept is that it is indeterminate. This is primarily due to the fact that there are too many variables present in each situation to determine precisely what is in the child's best interest. It is said<sup>143</sup> that the following requirements must be met to enable a court to determine what is in the child's best interest:

- 1 all the options must be known;
- 2 all the possible outcomes of each option must be known;
- 3 the probabilities of each outcome occurring must be known; and,
- 4 the value attached to each outcome must be known.

Although the first requirement can sometimes be met, it is impossible to comply with all four requirements. Since human nature is not predictable and situations may change, any conclusion must at best be speculative. What is in the best interest of the child will, therefore, to a large extent depend on the view of the judge presiding over the case, based on the facts before him and in adherence to the stare

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142 1988 Best Interest 11.

143 Heaton 1988 Best Interest 11 with reference to Elster 1987 UCLR 12.

decisis or judicial precedent system.<sup>144</sup> Precisely because of the uniqueness of each case, it is submitted that a judge has a wide discretion in this regard. Thus it has been stated by a South African court<sup>145</sup> in its capacity as upper guardian in a custody case that "(g)ood cause must be shown before a court will interfere (with parental power), but good cause is not capable of precise definition". Each case must, therefore, be considered on its merits.<sup>146</sup> In *Petersen en 'n Ander v Kruger en 'n Ander*<sup>147</sup> the court emphasised its wide discretion in terminating the parental power of a couple in favour of another couple by stating: "(E)nige grond wat op die welsyn van die kind betrekking het kan as rede vir die hof se inmenging dien" and further "(b)y 'n hof weeg die belange van die kind die swaarste, maar die regte van die ouers moet nie buite rekening gelaat word nie".

The British writers, Bromley and Lowe,<sup>148</sup> in their discussion of what they refer to as the "welfare principle"

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144 The historical development and contents of the principle is discussed by Hahlo H R and Kahn E 1973 *The South African Legal System and its Background* 240 et seq.

145 *Short v Naisby* supra 575 B.

146 See also *September v Karriem* 1959 3 SA 687 C.

147 Supra.

148 1987 Bromley's *Fam Law* 317.

reach some interesting conclusions. They support a practical approach and to my mind, correctly point out that "a judge is not dealing with what is ideal for the child but simply with what best can be done in the circumstances".<sup>149</sup> They furthermore point out that the discretion of judges is not unlimited in determining what is in the child's best interest since they must adhere to the views as applied in the courts, which "are in turn influenced both by knowledge and understanding of child development and by the prevailing societal views of child rearing".<sup>150</sup> They hasten to add that both the views of society and those of the courts are subject to change.

The theoretical basis of what is in the child's best interest therefore, can never be precisely determined since it is linked to the views of society and the courts, which are subject to change. In this respect the criterion of the best interest of the child contains similar intrinsic obstacles as the criterion of the *boni mores* or public policy, which features strongly in determining the validity of contracts.<sup>151</sup>

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149 Ibid.

150 Ibid.

151 See chapter 3 at under *Boni Mores*.

Maidment<sup>152</sup> supports a broadening of the criterion to a more holistic approach namely what is in the interest of the family rather than just the individual child. Although the basis is theoretically broadened in this approach, it is submitted that to determine what is in the best interest of the family could prove equally difficult. If one considers, for example, the possible application of this criterion in the Baby M case, which has proved the most controversial and publicised surrogacy case in the USA so far, some serious conflicting interests emerge. Surely to award custody to the Sterns (the intended parents) would be in the best interest of their family, especially since Mr Stern was the biological father of the child. Similarly, to award custody to the surrogate (genetic) mother, Mrs Whitehead, who had two other children from her marriage, would be in the interest of their (the Whiteheads') family. The interest of the family criterion therefore, does not seem to provide a more equitable or easier solution to the problem of custody - especially in surrogacy. It is submitted that the "best interest" criterion should remain the only one in custody issues, but that due regard be given to family relationships as well.

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152 Child Custody and Divorce 160 cited in 1987 Bromley's Fam Law 318.

It is submitted that although the courts refer to the best interest of the child, they nevertheless (albeit sometimes unconsciously) consider the family background in its totality.

Maidment<sup>153</sup> states that: "When a court makes a custody decision it may attempt to heed the child's needs but it is essentially making a decision as to which available adult ... is to care for the child ...". This is clearly demonstrated by the court's deliberations in the Baby M I case. The court, in applying the best interest criterion in the case, considered the following questions:

- 1      Was the child wanted and planned for?
- 2      What is the emotional stability of the people in the child's home environment?
- 3      What is the stability of the families involved?
- 4      What is the ability of the subject adults to recognise and respond to the child's physical and emotional needs?
- 5      What are the family attitudes towards education and their motivation to encourage curiosity and learning?
- 6      What is the ability of the adults to make rational

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153 Child Custody and Divorce 149 cited in 1987 Bromley's Fam Law 318.

judgments?

- 7 What is the capacity of the adults in the child's life to instill positive attitudes about matters concerning health?
- 8 What is the capacity of the adults in the baby's life to explain the circumstances of origin with least confusion and greatest emotional support?
- 9 Which adults would better help the child cope with her own life?

These questions cover a broad spectrum and it is submitted are more a test of suitable parenthood - thus adult-oriented - than a determination of the child's best interest. From the outset, if one considers the social, educational and psychological background of the two couples involved, it is not surprising that the court found the Sterns (intended parents) to be in a better position to care for the baby.

A brief consideration of the social, educational and psychological background of the Whiteheads (surrogate mother and her husband) leaves one with a feeling of unease. The family had moved home at least twelve times between 1973 and 1981 and had stayed with family members on several occasions. They had filed for bankruptcy at one stage and were also separated for a while in 1978, during which time Mrs Whitehead received public financial assistance. Mr



Whitehead was an alcohol abuser who had had his driver's licence suspended on two occasions for alcohol-related accidents. Mrs Whitehead was found by the court (Baby M I) to be manipulative, impulsive and exploitative and for the most part, untruthful. From the court records, the Sterns, on the other hand, appear to be a very stable couple with a positive attitude to life and well equipped to provide a secure home for the child. In the light of Mr Stern's background, it is understandable that the couple opted for surrogacy as a final solution to their problem.<sup>154</sup>

Although it is expected of judges to be unbiased and objective, it is not impossible that some personal facts regarding the genetic parents (Mr Stern and Mrs Whitehead) might have influenced the court in reaching its decision. Surely the fact that Mr Stern was the sole survivor of his family and that his wife suffered from multiple sclerosis which could be exacerbated by pregnancy must have affected the decision, although these are not directly related to the

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154 Mr Stern and his parents were the sole surviving members the Holocaust. The family settled in the USA shortly after the birth of Mr Stern. Mr Stern lost his father when he was 12 years old and his mother in 1983, leaving him as the only surviving member of the family. Mrs Stern, a 41 year old paediatrician, suffers from multiple sclerosis, which could be exacerbated by pregnancy.

child's best interest, but rather to what would benefit this couple.

Sorkow J has been accused of several biases in his decision in the Baby M I case, not only in the popular press, but also in legal literature,<sup>155</sup> despite his declaration that his decision was reached entirely with regard to the best interests of the child.<sup>156</sup> The New Jersey Supreme Court in Baby M (II) also added that Mary Beth Whitehead was judged "rather harshly" by Sorkow. The court did not regard interest in the education of the child as an all-important aspect in deciding who should have custody. The court explained that the best interest criterion is "designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life".<sup>157</sup> After a careful examination of all the facts, the court concluded that the Whitehead family could not provide the necessary security for the child and also relying on the best interest criterion, awarded custody to William Stern.

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155 Areen J "Baby M Reconsidered" 1988 Geo J Fam L 1741 - 1758.

156 Baby M I 217 N J Super at 323 525 A 2d 1132.

157 109 N J at 460 537 A 2d 1260.

A question not addressed by the court was whether a custody award in surrogacy cases could have a detrimental effect on the marriages of either party. In the light of the reported separation of the Whiteheads after the trial, this aspect should have enjoyed some attention, since Mrs Whitehead was awarded substantial visitation rights.

The question may also be asked whether the child's best interest should be viewed from the short, medium or long-term prospects.<sup>158</sup> Although the short-term situation can possibly be more accurately assessed than the medium or long term situation, Heaton must be supported in her view that one should not merely look to short-term consequences, but also to medium and long-term consequences of the decision, although the latter are admittedly not easily determinable.<sup>159</sup>

### 5.2.3 LEGITIMACY

It is generally accepted that children are legitimate if they are conceived and born during the subsistence of the

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158 Heaton 1988 Best Interest 13.

159 Heaton 1988 Best Interest 14.

marriage of their parents.<sup>160</sup> Prior to the enactment of the Children's Status Act, the question could be posed whether the marriage referred to is that of the surrogate and her husband or that of the commissioning couple. Especially in full surrogacy where genetic material is provided by the commissioning couple, one could argue that since they have provided the genetic material during the subsistence of a legitimate marriage between them, they should be considered the legal parents of the child. The Act has resolved the uncertainty which existed in this regard as "the marriage" clearly refers to that of the surrogate and her husband.

The Children's Status Act was enacted specifically to afford protection to children against the detrimental effects of illegitimacy in general. The view advanced is that it seems unfair to punish children for the misdeeds of their parents.<sup>161</sup> The aim of s 5 of the Act is to provide legitimacy to children conceived by artificial insemination or in vitro fertilisation with donor gametes, who were

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160 Spiro 1985 Law of Parent and Child 20 with reference to Grotius 1 12 2; Van Leeuwen CF 1 13 5; Van Leeuwen HRHR 1 7 2 and Schorer Ad Grotium n 47(1).

161 Memorandum on the Objects of the Children's Status Bill 1987 8. See also in general Lupton 1985 TSAR 277 - 295; Strauss 1984 Doctor, Patient and the Law 189.

previously considered illegitimate.<sup>162</sup> In this respect the Children's Status Act is to be welcomed. Unfortunately some uncertainties remain regarding the status of the child conceived by the artificial insemination or in vitro fertilisation of an unmarried woman.<sup>163</sup>

The Artificial Insemination Regulations<sup>164</sup> in terms of the Human Tissue Act restrict artificial insemination and in vitro fertilisation to a married woman, provided her husband has consented to the agreement in writing.<sup>165</sup> This restriction fails to provide certainty regarding the relationship between the child and its genetic father, should an unmarried woman be inseminated artificially.<sup>166</sup> The legislature merely discounted such a possibility.

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162 V v R supra.

163 Van Wyk A H "Mater Hodie Semper Incerta Est? 'n Evaluasie van Artikel 5 van die Wet op die Status van Kinders 1987" 1988 TSAR 467.

164 R 1182 GG 10283 20-06-1986. See also Schutte M "Artificial Insemination and In Vitro Fertilisation" 1985 DR 347.

165 Reg 8(1).

166 This restriction also applies to a widow whose husband died before artificial insemination could be effected as she is no longer a married woman in terms of the Act, since marriage is dissolved by the death of one of the spouses.

Furthermore, if a surrogate child is conceived as a result of physical intercourse with an unmarried surrogate mother, who honours the agreement and hands the child over to the commissioning couple, the child will be the illegitimate child of the surrogate mother and commissioning (genetic) father. If the latter can prove his paternity, his wife can apply for a stepparent adoption with few legal barriers.<sup>167</sup> This situation is unsatisfactory as it could encourage infertile couples to revert to extramarital intercourse, which is surely a more substantial threat to the stability of a marriage than the use of artificial insemination or in vitro fertilisation.

## 6 CONCLUSION

The flexibility of our common law is clearly demonstrated by the application of the welfare principle or best interest of the child criterion by our courts. The best interest of the child is considered not only in divorce or adoption

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167 As the child is illegitimate, the parental power rests with the surrogate mother, who has to consent to the transfer of parental power. See Eckard 1988 *Kinderhofondersoeke* 163 who interprets s 17(a) and (b) as a total prohibition to adoption by a natural parent. If the child is therefore the illegitimate child of the surrogate and the commissioning father, he and his wife are still prevented from jointly adopting such a child. There is nothing, however, which prevents the commissioning wife from adopting such a child.

proceedings, but is also applied by the Supreme Court in its capacity as upper guardian of all minors in sensitive issues such as the termination of incidents of parental power or parental power in general. The best interest test should provide a familiar guideline to any court faced with surrogacy issues. Unfortunately, some familiar common law statements such as the *mater semper certa est* statement or the application of consanguinity as a criterion for legal rights and responsibilities to a child no longer provide certainty. These aspects should be settled by legislation. Surrogacy should further not be indirectly regulated by legislation which was not enacted for the purpose of regulating surrogacy.<sup>168</sup> Anomalies created by the combined effect of the Children's Status Act and the Child Care Act should also be cleared up by an amendment to the Children's Status Act to exclude surrogate motherhood.<sup>169</sup>

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168 See the Recommendations in chapter 7.

169 Ibid.

CHAPTER 6      LIABILITY OF MEDICAL PRACTITIONERS IN  
 ASSISTED REPRODUCTION TECHNOLOGY AND  
 SUPROGATE MOTHERHOOD

1      INTRODUCTION

In this chapter the possible civil and/or criminal liability of medical practitioners, providing professional assistance during assisted reproduction and surrogacy arrangements is examined. Although a clear distinction exists between crimes and a delict, they also share certain common features in that both are forms of unlawful conduct.<sup>1</sup>

The role of medical practitioners<sup>2</sup> and the grounds on which they may be held liable are examined. The informed consent doctrine is examined with regard to potential liability in surrogacy arrangements. The assisted reproductive techniques utilised in most surrogacy arrangements, are often of a highly specialised nature.<sup>3</sup> Although not directly addressed,

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1      A single act may constitute a delict as well as a crime, for instance theft, fraud and assault. For the distinction between a crime and delict see Neethling Potgieter and Visser 1990 *Law of Delict* 7; Van der Walt J C 1979 *Delict: Principles and Cases* 5.

2      See also chapter 3 with regard to the principles of contractual and delictual liability.

3      In vitro fertilisation and embryo transfer as forms of artificial insemination are usually utilised. Artificial insemination of a person is defined in s 1 of the Human Tissue Act as amended as: "(T)he introduction by other than natural means of a male  
 (Footnote Continued)



the definition of artificial insemination in the Human Tissue Act is wide enough to cover surrogacy. Obtaining the informed consent of all the parties to the procedure is of the utmost importance.

Recent developments and prevailing views on liability in assisted reproductive technology in foreign jurisdictions are compared with the situation in South Africa at present. Recommendations are put forward as to how liability could reasonably be enforced, whilst protecting the fundamental rights<sup>4</sup> of the parties in assisted reproduction as well as the interest of the child.

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(Footnote Continued)

gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including: (a) The bringing together outside the human body of a male and a female gamete or gametes with a view to placing the product of a union of such gametes in the womb of a female person or (b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of a female person".

- 4 See the dictum in *Sayed v Potgieter* 1979 3 SA 354 N at 356 where it was stated with reference to a dictum regarding the patient's rights in *Stoffberg v Elliot* 1923 CPD 148 and *Esterhuizen v Administrator of Transvaal* 1957 3 SA 710 T at 718 B that "(t)he individual has the right, perhaps best described as a basic or fundamental right, to complete bodily security and infringement of it is an actionable wrong".

## 2 THE MEDICAL TEAM

The medical team may consist of scientists, reproductive biologists, embryologists, nurses or other health-care workers. Members of the team may be employed by an institution, for instance an academic hospital (linked to an university) or by the State or a particular province. Other teams work in private clinics. It should be noted that the Regulations in terms of the Human Tissue Act provide that artificial insemination and in vitro fertilisation may only be performed on approved premises.<sup>5</sup> In South Africa infertility clinics exist in all the major provincial and academic hospitals.<sup>6</sup>

Apart from liability under common law or statutory law, medical practitioners, health care-workers, psychologists and nurses are also subject to the disciplinary control of their own professional bodies.<sup>7</sup> Medical practitioners and

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5 The premises must be approved by the Director-General of National Health and Population Development in terms of Reg 11 of the Regulations in terms of the Human Tissue Act.

6 For a list of these hospitals see chapter 1; Bernstein J 1989 *Yes We Can Have a Baby* 48.

7 See the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 and the Nursing Act 50 of 1978.

psychologists<sup>8</sup> are subject to the control of the South African Medical and Dental Council.<sup>9</sup> Furthermore, if they are employed by the state or a provincial hospital, they are also subject to administrative regulations. The Medical Council performs the active function of peer-review over medical practitioners. It exercises disciplinary powers over all registered practitioners. The Council may institute an enquiry into any complaint, charge or allegation of improper or disgraceful conduct by medical practitioners or other persons registered in terms of the Act.<sup>10</sup> It is therefore in a position to decide whether a certain practice meets the ethical standards of the profession or not.<sup>11</sup>

The South African Medical Research Council<sup>12</sup> is a statutory body protecting patients' rights in medical research. The Council also has a duty to "exercise proper control over the use of human or animal material in experimentation in

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- 8 Amongst other important powers exercised, the Council has, inter alia, established a Board governing the psychology profession. The role of psychiatrists and psychologists is discussed in chapter 2.
- 9 First established by Act 13 of 1928 and now governed by Act 56 of 1974, hereinafter referred to as the Medical Council.
- 10 S 41(1).
- 11 Pretorius v S A Geneeskundige en Tandheelkundige Raad 1980 2 SA 354 T; Meyer v S A Medical and Dental Council 1982 4 SA 450 T.
- 12 Established by Act 19 of 1969.

connection with any matter of which the Council has charge".<sup>13</sup> Updated guidelines in the form of **Ethical Considerations** were published in 1987. Their aim is to provide assistance to medical practitioners, researchers and health-care workers in their difficult task in dealing with, inter alia, in vitro fertilisation and experimentation with embryos.

In most instances the delictual liability of medical practitioners, researchers or other health-care workers can be readily established by applying the general principles of the law of delict.<sup>14</sup> Thus a medical practitioner, researcher or other health-care worker who intentionally or negligently by his/her wrongful conduct causes an individual to suffer either pecuniary loss or an infringement of his rights of personality, may be held liable. A causal connection must exist between the act and the resulting damage.<sup>15</sup>

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13 S 17.

14 Neethling, Potgieter and Visser 1990 Law of Delict 4 defines a delict as: "The act of a person which in a wrongful and culpable way causes harm to another". The five elements therefore are, an act, wrongfulness, fault, harm and causation; See also Van der Walt 1979 Delict 1.

15 Strauss S A and Strydom M J 1967 **Die Suid-Afrikaanse Geneeskundige Reg** 111; Strauss S A "Genetic Manipulation: The Legal Liability of the Practitioner" in 1980 **Genetics and Society** Oosthuizen G C, Shapiro H A and Strauss S A (eds) 63.

In a civil action, damages may be claimed by the injured party and/or an interdict granted, restraining the doctor, scientist or health-care worker from continuing on the wrongful course of action on which he/she has embarked. When the same act also constitutes a criminal offence, such as assault or iniuria, the elements of the specific crime must be found to exist in order to establish liability.

In certain circumstances liability may prove difficult to establish.<sup>16</sup> Can a medical practitioner who utilises assisted reproductive technology be held liable if the donor sperm carries a genetic defect or the AIDS virus? Is a medical practitioner responsible for the quality of the sperm or ova used in an in vitro fertilisation programme? Is he/she responsible for placing a defective embryo in the uterus of the mother during an embryo transfer? Can a scientist or other health-care worker in an in vitro fertilisation programme be held liable for a laboratory accident whereby a healthy embryo is damaged or destroyed? May frozen sperm or embryos be destroyed or given to other childless couples without the consent of the donors or natural parents? May an in vitro or surrogate child who, after birth, suffers psychological damage as a result of the

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16 See in general Furrow B R, Johnson S H, Jost T S and Schwartz R L 1987 *Health Law - Cases Materials and Problems* 824.

way in which it was born, hold the doctor liable in a so-called "wrongful life" or "birth" action?

These are just some of the many question which may present themselves in this field and which are addressed in this chapter.

## 2.1 ASSISTANCE BY AND LIABILITY OF MEDICAL SPECIALISTS

### 2.1.1 MEDICAL PRACTITIONERS AND GYNAECOLOGISTS

As a general rule, couples who experience some form of infertility, will usually first consult their family doctor. He/she may then refer them to a gynaecologist or an infertility specialist or clinic where special investigations are performed to determine why conception has not taken place.

One should bear in mind that independently practising medical practitioners are under no duty to treat a patient with one exception.<sup>17</sup> Should a potentially life-threatening situation exist of which the medical practitioner is aware, but nevertheless unreasonably refuses to commence treatment, he may face delictual liability.<sup>18</sup> It is difficult to

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17 Strauss 1984 Doctor, Patient and the Law 20 et seq.

18 Strauss 1984 Doctor, Patient and the Law 20 et seq;  
(Footnote Continued)

envisage such a situation in the field of assisted reproduction. The possible exception might be that of a patient whose infertility is so stressful to his/her mental health, that he/she may threaten to commit suicide or where the future of the marriage is seriously imperiled. Whether such a patient should be admitted to an assisted reproduction programme is certainly debatable as infertility treatment may cause additional stress.

In vitro fertilisation and embryo transfer require specialised equipment and advanced professional skill and experience and should therefore be performed only by someone who is specifically trained in this field.<sup>19</sup> The professional rules of conduct for medical practitioners,<sup>20</sup> clearly state that it is improper for medical practitioners to perform professional acts for which they are inadequately trained and/or insufficiently experienced (except in an emergency).<sup>21</sup>

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(Footnote Continued)

Strauss S A 1987 Legal Handbook for Nurses and Health Personnel 8 et seq.

19 For a description of the procedures see Bernstein 1989 Yes We Can Have a Baby - a Positive Guide to Infertility 42 - 45; Fishel S and Symonds E M 1986 In Vitro Fertilisation - Past Present Future 135 - 146; Wolf D P and Quigley M M Human in Vitro Fertilization and Embryo Transfer 327 - 364; Wood C W and Westmore A 1983 Test Tube Conception 59 - 88.

20 Published in GG R2278 of 3 December 1976.

21 Reg 25(1).

Lupton<sup>22</sup> submits that "the skills required for a successful in vitro fertilisation and subsequent embryo transplant places the technique beyond the scope of the average general practitioner" and that "a practitioner who does attempt ET<sup>23</sup> without the necessary research and training, would, (it is submitted), be misleading his patients and his actions would certainly be negligent, unless he measured up to the standard of the reasonable practitioner with that (specialised) training".

The infertility specialists should further determine whether the problem is one of male infertility, female infertility or a combination of both. This is possible through a physical examination of the woman as well as extensive infertility tests and procedures performed on both spouses. Their consent to these procedures, like any other medical procedure, should obviously first be obtained.<sup>24</sup>

Once the cause of infertility has been established, the infertility specialists should explain and discuss the proposed or optional treatment available to the couple. This

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22 The Legal Consequences of Artificial Insemination and Embryo Transplantation in Humans D Phil Univ of Natal 1982 132.

23 Embryo transfer.

24 This is also stipulated in Reg 9(d) of the Regulations in terms of the Human Tissue Act.



discussion should enable the couple to accept or reject the proposed treatment or procedure. In proposing a specific or alternative treatment, aspects which are usually considered are the woman's age, the state of her physical health, the duration of the problem and the desire of the couple to have a child.<sup>25</sup> Here again, the couple's (written) consent should be obtained before any treatment is attempted. This aspect is dealt with in greater detail under the discussion of informed consent.<sup>26</sup>

## 2.2 BASIC PRINCIPLES OF INFORMED CONSENT

The doctrine of informed consent has been the subject of a vast amount of medical and legal literature. In this discussion only the most important aspects are highlighted particularly where this doctrine is of importance to assisted reproductive medicine and surrogate motherhood.

It is generally accepted that a medical practitioner who subjects a patient to treatment against his/her express will may face civil or criminal liability in different forms.<sup>27</sup>

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25 See also par 2.12 of the Warnock Report in this regard.

26 *Infra*.

27 Strauss 1984 Doctor, Patient and the Law 3 et seq;  
Giesen D 1981 *Arzthaftungsrecht - Medical Malpractice*  
Law 171 et seq; Giesen 1988 *International Medical*  
(Footnote Continued)

Such interventions could constitute an infringement of the patient's physical integrity or dignitas.<sup>28</sup> It could, in appropriate circumstances, also constitute civil or criminal iniuria.<sup>29</sup> van Oosten<sup>30</sup> points out that in South Africa there seems to be a preference for an action for negligence in delict rather than assault.<sup>31</sup> In practice, it appears furthermore that there is a preference for an action for negligence in delict rather than an action based on breach of contract.<sup>32</sup>

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(Footnote Continued)

Malpractice Law 265 et seq; Van Oosten F F W The Doctrine of Informed Consent in Medical Law LLD Unisa 1989 31 et seq. Rosoff A J 1981 Informed Consent - A Guide for Health Care Providers 1 et seq.

28 Although the writers are not ad idem about the term "dignitas", it is eloquently described by Neethling J 1985 Persoonlikheidsreg 55 n 53, with reference to De Villiers 1899 The Roman and Roman Dutch Law of Injuries 24 19 as "(t)hat valued and serene condition in (a person's) social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".

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30 1989 Informed Consent 51.

31 See Strauss and Strydom 1967 Die Suid-Afrikaanse Geneeskundige Reg 111. Exceptions to the rule are two important South African cases: Stoffberg v Elliott supra and Esterhuizen v Administrator Transvaal supra, where damages were awarded on the grounds of assault.

32 Lupton 1982 Legal Consequences 142 et seq; See, however Administrator, Natal v Edouard supra.

Obtaining the informed consent of the patient is therefore of the utmost importance for any lawful medical intervention.<sup>33</sup> Should a medical practitioner or other health-care worker be accused of negligence, the consent may be raised as a ground of justification (regverdigingsgrond) excluding the element of unlawfulness or wrongfulness of a crime or delict.<sup>34</sup> The *volenti non fit iniuria* principle is important in this regard.<sup>35</sup> If a person willingly consents to an act in the form of either a specific procedure, for instance a surgical operation,<sup>36</sup> or an activity involving a risk of harm, eg consent to the risk of side-effects of an operation,<sup>37</sup> that person can generally not complain that a delict or crime has been committed against him/her.

It is not necessary for the medical practitioner to inform the patient of all conceivable details pertaining to and

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33 Strauss 1984 Doctor, Patient and the Law 3; Van Oosten 1989 Informed Consent 31 et seq.

34 Van Oosten 1989 Informed Consent 15 and references cited in n 7 and 8; Strauss S A Toestemming tot Benadeling as Verweer in die Strafreë en die Deliktereë Unisa 1961 272 and 311.

35 See in general Strauss 1961 Toestemming; Strauss and Strydom 1967 Die Suid-Afrikaanse Geneeskundige Reg 182 - 183; Van der Walt 1979 Delict, Principles and Cases 50; Neethling Potgieter and Visser 1990 Law of Delict 84 - 86; Van der Merwe and Olivier 1989 Die Onregmatige Daad in die Suid-Afrikaanse Reg 89.

36 Strauss 1961 Toestemming 7.

37 Strauss 1961 Toestemming 50.

consequences of the proposed procedure.<sup>38</sup> It is sufficient to inform the patient in general terms about the proposed treatment and material risks involved.<sup>39</sup> This should be explained to him/her in clear, understandable and unambiguous language.

Van Oosten<sup>40</sup> highlights the twofold purpose and function of informed consent. First, it enables the patient "to consider, weigh and balance the benefits and disadvantages of the proposed intervention in order to make a rational choice either to undergo or refuse it". Secondly, it "encourages rational decision-making and ensure patient self-determination". Van Oosten further distinguishes between self-determination information or consent information on the one hand, and therapeutic or preventive information on the other hand.<sup>41</sup> The former enables the patient to reach a rational decision. The latter contains information which makes the procedure possible. It further contains information about the preparation for the procedure

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38 See Strauss and Strydom 1967 *Die Suid-Afrikaanse Geneeskundige Reg* 221.

39 See also Van Oosten 1989 *Informed Consent* 61 and the references quoted in n 77 and 78.

40 1989 *Informed Consent* 58, 448.

41 Van Oosten F F W "Die Leerstuk van Ingeligte Toestemming in Surrogaatmoederskapsgevalle" 1990 DJ 343.

and the behaviour of the patient prior to, during and after the procedure has taken place.<sup>42</sup> According to him the "self-determination" information is the more important. It places a duty on the medical practitioner to inform the patient *inter alia* of the diagnosis, the treatment, the advantages, the disadvantages, the expected results, risks and possible complications and if applicable, alternatives.<sup>43</sup>

It is said that common sense requires that patients are provided with all relevant information to allow them to make a rational choice.<sup>44</sup> The question of what is relevant, is often difficult to ascertain. When too much information is provided, even the most intelligent patient may refuse to undergo treatment or urgent operations.<sup>45</sup> Too little information, on the other hand, can lead to litigation.

Medical practitioners in the USA, who are perpetually under the threat of malpractice suits<sup>46</sup> follow more complex and

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42 Van Oosten 1990 DJ 343.

43 Van Oosten 1989 Informed Consent 295 et seq 438 - 439 440 - 449; \*Van Oosten 1990 DJ 343.

44 Powers M and Harris N 1990 Medical Negligence 801.

45 1990 Medical Negligence 801; Van Oosten 1989 Informed Consent 50 - 51.

46 Strauss S A "Geneesheer, Patient en die Reg: 'n Delikate Driehoek 1987 TSAR 3.

time-consuming procedures in an effort to obtain informed consent.<sup>47</sup> In the currently leading English case of *Sidaway v Bethlem Royal Hospital Governors*<sup>48</sup> the court, in a majority decision, declared that the doctrine of informed consent, based on a full disclosure of all the facts to the patient, does not form part of the English law.<sup>49</sup> It has also been stated that in the United Kingdom, the doctrine of informed consent is not considered a legal concept.<sup>50</sup> In fields of medicine which carry a definable risk of complications, the approach is one of sensible, realistic and full discussion.<sup>51</sup>

In South Africa it is accepted that the medical practitioner's duty is confined to providing the patient with a general idea of the serious or dangerous risks

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47 See for instance the detailed consent forms in "New Guidelines for the Use of Semen Donor Insemination: 1990" published by the American Infertility Society in 1990 *Fertility and Sterility* Vol 53 No 3 Appendix C. They are, however, under no obligation to inform the patient of all the facts in order to obtain informed consent.

48 1985 1 All ER 643 HL.

49 See the discussion in Van Oosten 1989 *Informed Consent* 99 et seq.

50 1990 *Medical Negligence* 801.

51 *Medical Negligence* op cit 801. For a detailed discussion of English law, see Van Oosten 1989 *Informed Consent* 70 - 189.

attached to the proposed treatment or procedures.<sup>52</sup> There is no obligation to disclose in detail all the complications that may arise or to disclose rare, idiosyncratic, unforeseeable, uncommon, unusual or remote adverse consequences that may result from the treatment.<sup>53</sup> The medical practitioner must give the patient a general idea in broad terms of the nature, scope, administration, importance, consequences, risks, dangers, benefits, disadvantages and prognosis of, as well as the alternatives to, the proposed intervention.<sup>54</sup>

Strauss,<sup>55</sup> with reference to some prominent German authors,<sup>56</sup> refers to the modern view that "over informing" a patient, may be tantamount to not informing him at all. The situation envisaged is where the medical practitioner furnishes his patient with such a massive amount of

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52 Strauss and Trydom 1967 *Die Suid-Afrikaanse Geneeskundi* Reg 221; Van Oosten 1989 *Informed Consent* 61, 448.

53 Van Oosten 1989 *Informed Consent* 46 et seq in a discussion of South African case law; *Lymbery v Jefferies* 1925 AD 236; *Esterhuizen v Administrator Transvaal* supra.

54 Van Oosten 1989 *Informed Consent* 448.

55 1984 *Doctor, Patient and the Law* 8; Strauss 1987 *TSAR* 5.

56 Deutsch E 1983 *Artzrecht und Arztneimittelrecht* 53 and Jescheck H-H 1978 *Lehrbuch des Strafrechts* 228 in 1984 *Doctor, Patient and the Law* 11 n 31 33.

technical information that the latter is unable to digest it. The medical practitioner may be held delictually liable if excessive information has the effect of causing the patient psychological or physical harm.

Another view is voiced by Simanowitz<sup>57</sup> who states that "(t)he more information that is given to a patient before treatment, the less likely legal advice is going to be sought when something untoward takes place".<sup>58</sup>

The doctrine of informed consent has undergone considerable changes over a period of time.<sup>59</sup> The requirements for valid consent have become more stringent in many jurisdictions, although there has been little change in South Africa and England. According to the former view, it was the duty of the medical practitioner to inform the patient about the nature of the proposed treatment, the results as well as the risks in such a manner as the reasonable practitioner would have done.<sup>60</sup> In some jurisdictions the courts have recently

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57 A British solicitor and executive director of Actions for Victims of Medical Accidence.

58 1990 Medical Negligence 87.

59 See Shultz M M "From Informed Consent to Patient Choice: A New Protected Interest" 1985 Yale L J 219 - 299.

60 Rosoff A J 1981 Informed Consent A Guide for Health Care Providers 34 et seq; Strauss TSAR 4; For a  
(Footnote Continued)



adopted a new approach - the so-called reasonable patient criterion.<sup>61</sup> This approach focuses on the informational needs of an average, reasonable patient. Under this rule a physician can be held liable if the court finds that the patient did not receive the information material to the decision to accept the proposed treatment. The criterion is no longer a medical one. It is a matter that the court should decide upon and no longer the medical practitioner.<sup>62</sup> The emphasis has therefore shifted to patient autonomy<sup>63</sup> and, as I understand it, with the court having the ultimate discretion.

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(Footnote Continued)

detailed discussion of the English cases, *Hills v Potter* 1983 3 All ER 716 (QB) 721 - 722 727 - 728; *Freeman v Home Office* 1984 1 All ER 1036 CA; *Sidaway v Bethlem Royal Hospital Governors* 1984 1 All ER 1018 CA; See also Van Oosten 1989 *Informed Consent* for a discussion of the leading English case: *Sidaway v Bethlem Royal Hospital Governors* 1985 1 All ER 643 HL.

- 61 Rosoff 1981 *Informed Consent* 38; Giesen 1988 *International Medical Malpractice Law* 271 et seq.
- 62 Strauss TSAR 4 citing *Natanson v Kline* 186 Kan 393, 350 P2d 621 1946. See Lord Scarman's dissenting judgement in *Sidaway v Bethlem Royal Hospital Governors* 1985 1 All ER 643 HL, discussed by Van Oosten *Informed Consent* 110 et seq.
- 63 For examples of this approach by the courts see *Canterbury v Spence* 464 F 2d 772 780 D C Cir (1972) USA. See van Oosten's discussion of the German caselaw 1989 *Informed Consent* 194 et seq.

### 2.2.1 INFORMED CONSENT IN ASSISTED REPRODUCTION WITH SPECIFIC REFERENCE TO SURROGACY

Although much has been said and written on the subject of informed consent in general, the informed consent doctrine in relation to surrogacy arrangements has received scant attention in legal literature.<sup>64</sup> In most instances the general principles of consent are applied to surrogacy arrangements. Van Oosten in his exposition of the doctrine of informed consent in surrogacy arrangements,<sup>65</sup> has provided a valuable point of departure, which merits consideration in this complex field of assisted reproduction.

For obvious reasons the doctrine of informed consent does not play a role where the parties fail to seek professional assistance and revert to so-called "self help" arrangements.<sup>66</sup> Two possibilities exist in this regard. First, artificial insemination may take place as a result of an agreement between the intended father and a surrogate whereby she inseminates herself with semen obtained from the former. Secondly, the intended father and a surrogate could

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64 For the first publication directly addressing informed consent in surrogacy in South Africa, see Van Oosten 1990 DJ 340 - 447.

65 Van Oosten 1990 DJ 340 - 347.

66 For the discussion of a South African incident, see chapter 3 and the Recommendations in chapter 7.

agree to extra-marital intercourse. Such an agreement falls outside the scope of artificial insemination as defined by the Human Tissue Act and Regulations. The child will be illegitimate and the agreement will for obvious reasons be contrary to public policy.<sup>67</sup>

In the first instance, the parties could theoretically be criminally liable for contravening statutory requirements<sup>68</sup>, but in most instances prosecution is unlikely. This can in the main be attributed to the lack of control over such arrangements. This practice is undoubtedly risky and unsatisfactory. When the donor semen is not screened, the recipient exposes both herself and the child to serious risks. Some of these include contracting AIDS, sexually transmitted diseases or the birth of a genetically handicapped child. An attempt should be made to limit these "self help" arrangements, although this is admittedly not an easy task.

Under common law, as well as under certain statutory provisions, medical practitioners have a duty to inform the

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67 Pretorius R "Surrogaat-moederskap: Implikasies in die Suid-Afrikaanse Regstelsel" 1987 DR 273.

68 For instance Reg 3 and Reg 14 of the Regulations and s 23(2) of the Human Tissue Act which only permits a medical practitioner or someone acting under his/her supervision to perform artificial insemination.

patients of the possible consequences of any procedures or treatment undertaken to alleviate the problem of infertility.<sup>69</sup>

In South Africa the procedure for obtaining the patient (and her husband's) informed consent for artificial insemination or in vitro fertilisation is set out in Reg 9 of the Regulations in terms of the Human Tissue Act.

A medical practitioner may not proceed with an artificial insemination before he/she has ensured that

"(t)he recipient and her husband have received advice and information from appropriate experts concerning -  
(aa) the possibilities, if any, of the recipient's being able to conceive in another manner;  
(bb) all the implications of artificial insemination including the problems that exists (sic) with regard to the technique of artificial insemination, the chances that the artificial insemination will be successful, the financial aspects, the consequences to the marriage, and the ethical, psychosocial and educational implications of artificial insemination, the risks attached to the genetic properties of a gamete, the prognosis regarding the child, and legal

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<sup>69</sup> See the discussion *infra*.

advice which may be obtained with regard to artificial insemination".

The Regulations place a heavy burden on the medical practitioner who performs artificial insemination and in vitro fertilisation. This is slightly alleviated by the requirement that the medical practitioner should only ensure that the patient and her husband have received the required information. For information regarding ethical, psychosocial and educational implications, the couple may consult the appropriate experts, eg social workers, psychiatrists and clergymen. Advice on the legal aspects, should be obtained from attorneys or legal advisers. A serious disadvantage of this procedure is that an already costly procedure may become totally out of reach for the average patient.

As the doctor-patient relationship is of a consensual nature, it is often not in writing. In more complicated medical procedures it has become customary to provide the patient with detailed advice and consent forms.<sup>70</sup> It is submitted that in vitro fertilisation and embryo transfer fall into this category and that an adequate agreement should exist between the patient and the medical

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70 Strauss 1984 Doctor, Patient and the Law 9; Strauss and Strydom 1967 Die Suid-Afrikaanse Geneeskundige Reg 105.

practitioner.<sup>71</sup> It has furthermore become routine, in certain infertility clinics, to provide the patients and their spouses with selected literature and visual material. Anatomical models or sketches are often used to explain the proposed procedure to the patients. Some infertility specialists use slides or video recordings.<sup>72</sup>

As in vitro fertilisation and embryo transfer have primarily developed during the last decade, it is submitted that the patients can only benefit from exposure to selected literature and the utilisation of visual material apart from written consent forms.

Based on the general principles of informed consent, Van Oosten,<sup>73</sup> recommends that the parties involved in a surrogacy arrangement should receive adequate knowledge and information to appreciate the nature of the proposed

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71 See also the advice of Strauss 1984 Doctor, Patient and the Law 33 that medical practitioners who are involved in drastic or unusual surgery, should inform the patients in writing of the essential nature of the procedure and the risks involved. A detailed written consent should also be obtained if possible.

72 This information was obtained during interviews with infertility specialists in various centres around the country.

73 1990 DJ 342 - 346.

procedure.<sup>74</sup> He emphasises the two most important aspects, namely:

- 1 protection of the patient's right to self-determination and freedom of decision, and
- 2 the promotion of rational decision-making about the proposed procedure. This implies that the patient should:
  - (a) Receive sufficient information to enable him/her to weigh the positive consequences against the negative ones, and
  - (b) to reach a decision whether to go ahead with the procedure or not.

With regard to (b), it should be borne in mind that in surrogacy arrangements, the parties are in a unique situation. As opposed to most infertile couples who turn to infertility specialists for medical assistance, they have already decided to include a third party - the surrogate mother - in the proceedings. Instead of having to cope with one couple, there are two couples involved (assuming that the surrogate mother is married). This aspect places the medical practitioner in a unique situation. He/she must ensure that all the parties receive adequate and appropriate

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74 1990 DJ 343.

information to enable them to appreciate the medical, legal, sociological and psychological aspects so that they may reach a rational decision.<sup>75</sup> This is undeniably a difficult task, especially since surrogacy is an extremely emotive experience. It has even been questioned whether a surrogate can make a rational choice as she commits herself to the agreement before she knows how she will feel about the child she is carrying.<sup>76</sup>

The help of professionals, such as psychiatrists, social workers or legal consultants could alleviate the burden on the medical practitioners and provide additional assistance to the parties in reaching a rational decision.<sup>77</sup>

For practical purposes a distinction is drawn between the information which should be conveyed to the intended parents

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75 Van Oosten 1990 DJ 343.

76 See the *Baby M* II case 109 N.J at 437, 537 A 2d 1248, where the court questioned whether a surrogate could ever grant "informed consent" to the terms of the contract even with sufficient evaluation and counseling; contra Macklin R "Is There Anything Wrong With Surrogate Motherhood? - An Ethical Analysis" in 1990 *Surrogate Motherhood* Gostin (ed) 136 - 150 142 - 143 and Andrews L "Surrogate Motherhood: The Challenge for Feminists" in 1990 *Surrogate Motherhood* Gostin (ed) 167 - 182 at 172 who supports the view that informed consent is possible.

77 See the discussion *infra*.



and that which should be conveyed to the surrogate and her husband, although to a large extent there is an overlap.

#### 2.2.2 INFORMING THE INTENDED PARENTS

The following information should in broad terms be conveyed to the intended parents:

- 1 The fact that the intended mother is unable to conceive, carry, or give birth to a baby and the reasons for the condition.<sup>78</sup>
- 2 The possibilities available in assisted reproduction technology, eg the use of donor gametes/surrogacy. If donor gametes are used, the rights of the parties concerned to such gametes or embryos.<sup>79</sup>
- 3 The applicable form of surrogacy, eg partial or complete surrogacy.<sup>80</sup>
- 4 If alternatives are available (such as adoption), the advantages and disadvantages of each.
- 5 The possibility of success or failure of the proposed

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78 See chapter 1 under Reasons for Infertility. See also Lupton 1986 TRW 148; Tager 1986 SALJ 391; Pretorius 1987 DR 270.

79 See the discussion *infra* under Proprietary Rights to Gametes.

80 See the description of the different forms in chapter 1 and 2.

procedure (percentage rates).

- 6 The possible risks and dangers involved in the proposed procedures.

### 2.2.3 INFORMING THE SURROGATE AND HER HUSBAND

The surrogate and her husband should be informed of:

- 1 The psychological and physical consequences of surrogacy, especially regarding the pregnancy, birth of the child, and of handing over the child to the intended parents after birth.
- 2 The risks attached to the proposed medical procedure,<sup>81</sup> including the hormonal treatment (fertility drugs) which induces super-ovulation and could result in multiple births and, occasionally, ovarian cysts.<sup>82</sup>
- 3 The possibility of the birth of a physically handicapped child and the possible consequences of such a birth.<sup>83</sup>
- 4 The possibility that the procedure could result in the

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81 The laparoscopy and egg pick-up (if it is used) and the artificial insemination/in vitro fertilisation and embryo transfer (if it is used).

82 See the discussion in chapter 1; Lupton 1982 *Legal Consequences* 140.

83 For instance that the child is not wanted by either party. See the discussion of the Malahoff/Strivers incident in chapters 3 and 4.

birth of more than one child and the consequences of such a birth.<sup>84</sup>

5 The rights of the parties to gametes and embryos.<sup>85</sup>

All the parties should be informed of the legal consequences of a surrogacy arrangement. The most important aspect which should be explained, preferably by a legal adviser, is the effect of the Children's Status Act on the status of the child.<sup>86</sup> The intended parents should, at least, be alerted to the fact that there are at present legal obstacles in securing parental rights to the child.

Van Oosten<sup>87</sup> suggests that as a result of the nature of surrogacy, there may be room for the so-called "therapeutic information" duty. The surrogate mother should be informed about behaviour expected of her during the pregnancy. Although this is usually carefully specified in the written contract,<sup>88</sup> it should nevertheless be discussed with the surrogate and her husband.

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84 For instance the financial consequences for the intended parents.

85 See discussion *infra* under Proprietary Rights to Gametes.

86 See the discussion in chapter 5 under Law of Persons.

87 1990 DJ 343 - 344.

88 See the discussion of the Contract in chapter 4.

#### 2.2.4 RISKS AND COMPLICATIONS IN GENERAL

Although some of the risks have already been highlighted, the parties to a surrogacy arrangement should be made aware of all the foreseeable risks and complications that could occur. These are usually contained in the written contract but also merits discussion.<sup>89</sup>

##### 2.2.4.1 RISKS AND COMPLICATIONS FOR THE INTENDED PARENTS

For practical purposes a distinction is drawn between the situation where:

- 1 the surrogate mother is also the genetic mother of the child (partial surrogacy), and
- 2 where donor gametes are used (either from donors or the intended parents) (full surrogacy).

Here again, there is an overlap as certain information is relevant to both couples, whereas other details are relevant to the specific form of surrogacy used.

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<sup>89</sup> Ibid.

#### 2.2.5 INFORMED CONSENT: PARTIAL SURROGACY

- 1 Where the surrogate mother is also the genetic mother of the child, the intended parents should be alerted to the fact that the surrogate may refuse to hand over the baby after birth. Since she is also the genetic mother, such a decision is probably more likely than where she is a host-mother with no genetic link to the child.
- 2 If the surrogate refuses to hand over the child, the legal, social and psychological consequences - eg that legally, the intended father (if he is also the genetic father) may take steps to prove paternity and claim custody to the child.<sup>90</sup>
- 3 The fact that either marriage could end in divorce and even the death of one of the parties to the contract prior to completion.

#### 2.2.6 INFORMED CONSENT: FULL SURROGACY

- 1 Even if the intended parents are also the genetic parents, they should nevertheless be alerted to the possibility of the surrogate refusing to hand over the baby and the legal, social and psychological

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90 A decision which the court will have to make. See the discussion in chapter 5.

consequences of such a decision.

- 2 Where donor gametes or a donor embryo is used, the risks are similar for the intended parents. There is, however, an exception in that if they are themselves the gamete donors, a court will probably be more sympathetically disposed towards them in awarding guardianship or allowing them to adopt the child.

#### 2.2.7 WHO SHOULD CONSENT?

Should artificial or in vitro fertilisation be performed on a woman without her consent - a situation which is unlikely to occur in practice - the practitioner would undoubtedly be liable for assault.

Consent should be obtained from a person who is legally competent to consent.<sup>91</sup> As a general rule spouses may individually consent to treatment. When treatment of a married person may affect his/her procreative functions, it is advisable,<sup>92</sup> but not always compulsory for the medical practitioner to obtain the consent of the other spouse

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91 See Strauss 1984 Doctor, Patient and the Law 4 et seq.

92 Strauss S A "Unsuccessful Sterilisation of Woman: Doctor Liable for Child-Raising Costs" 1990 S A Prac Man 16.

before proceeding with treatment.<sup>93</sup> The Regulations<sup>94</sup> in terms of the Human Tissue Act, however, require the written consent of the husband prior to artificial insemination or in vitro fertilisation of his wife. The gamete donor, if it is applicable, should also sign a written consent for the withdrawal of the gametes.<sup>95</sup>

As a result of the complexity of surrogacy it is advisable to use written consent forms for artificial insemination or in vitro fertilisation. The medical practitioner should further ensure that:

- 1 the consent of the parties be obtained for the entire procedure;<sup>96</sup>
- 2 no guarantee or assurance be given that a pregnancy will result from the treatment;
- 3 no guarantee or assurance be given that the treatment will result in the birth of a single child;
- 4 no guarantee or assurance be given that the

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93 See in this regard Sonnekus J C "Sterilisatie - Toestemming deur Nie-pasient-gade?" 1986 DR 369 - 378 373 377 who strongly supports the autonomy of women to make their own procreative decisions.

94 Reg 8(1).

95 S18 of the Human Tissue Act.

96 The parties should, under specified circumstances, retain the right to terminate the contract, for instance after several failures to conceive.

treatment will result in the birth of a child free from any mental or physical handicaps;

- 5 no guarantee or assurance be given that the pregnancy and childbirth will be free of any complications.

Despite obtaining adequate consent and carefully explaining the proposed procedures to the patients, the physician cannot free him or herself from the obligation to use due care and skill in the performance of any of the proposed procedures.<sup>97</sup> The well-known principles to ascertain negligence are also applied in assisted reproductive technology.<sup>98</sup>

### 2.3 LIABILITY OF INFERTILITY SPECIALISTS IN ASSISTED REPRODUCTIVE TECHNOLOGY WITH REFERENCE TO SURROGACY

If artificial insemination and in vitro fertilisation are performed with due care and in compliance with the Human Tissue Act and Regulations, medical practitioners will not readily incur delictual or criminal liability.

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97 Morris R C and Moritz A R 1971 Doctor and Patient and the Law 101.

98 See chapter 3 and infra under Negligence.



Lupton<sup>99</sup> provides a detailed and useful discussion of the liability of medical practitioners performing artificial insemination, in vitro fertilisation and embryo transfer. His discussion is, however, based on the Anatomical Donations and Post-Mortem Examinations Act,<sup>100</sup> which has since been repealed by the Human Tissue Act and Regulations. The latter changed the legal situation considerably. Noteworthy changes have also occurred in the practice of assisted reproduction in South Africa and abroad, which warrants discussion. Lupton's classification<sup>101</sup> of the grounds of liability is, however maintained in the present discussion. Under liability, he distinguishes between strict liability, negligence and iniuria.

### 2.3.1 STRICT LIABILITY

Strict liability is clearly not favoured in South African medical malpractice suits.<sup>102</sup> The medical practitioner is therefore by implication relieved of liability for non-negligent and non-intentional damage arising from in vitro fertilisation and embryo transfer. Liability rests on

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99 1982 Legal Consequences 142 et seq.

100 24 of 1970.

101 Lupton 1982 Legal Consequences 142 et seq; See, however Administrator, Natal v Edouard supra.

102 Strauss 1984 Doctor, Patient and the Law 285.

fault - culpa (negligence) or dolus (intent).<sup>103</sup> The maxim, *res ipsa loquitur*<sup>104</sup> which if applied in the law of delict may result in strict liability, was rejected by the Appellate Division in a medical malpractice suit, *Van Wyk v Lewis*.<sup>105</sup> Although the rule is not restricted to medical malpractice suits,<sup>106</sup> it developed in certain jurisdictions as a rule of sympathy to combat the so-called "conspiracy of silence" amongst medical practitioners.<sup>107</sup>

### 2.3.2 NEGLIGENCE

Negligence in this discussion refers to an element of fault, which is a prerequisite for delictual liability.

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103 Strauss 1984 *Doctor, Patient and the Law* 285; Lupton 1982 *Legal Consequences* 142.

104 The literal translation is "the thing speaks for itself". Strauss 1984 *Doctor, Patient and the Law* 283 explains it thus: "Mere proof by a plaintiff of an injurious result caused by an instrumentality which was in the exclusive control of the defendant, or following upon the happening of an occurrence solely under the defendant's control, gives rise to a presumption of negligence on the part of the latter. The damage or injury must be of such a nature that it would ordinarily not occur except for negligence".

105 1924 AD 438; See also *Blyth v Van den Heever* 1980 1 SA 191 A; *Buls & Ano v Tsatsarolakakis* 1976 2 SA 891 T; *Duke v Administrator, Transvaal* 1957 3 SA 710 T.

106 See Neethling, Potgieter and Visser 1990 *Law of Delict* 127 - 128 for other examples.

107 For a discussion of the doctrine, see Strauss 1984 *Doctor, Patient and the Law* 283 et seq; Lupton 1982 *Legal Consequences* 143 n 72.

Breach of contract and possible delictual damages, such as patrimonial damages (*actio legis Aquiliae*), *iniuria*, claim for pain and suffering and claim for emotional shock are discussed in chapter 3.

As already pointed out, patients who have suffered pecuniary loss or infringement of their rights of personality, generally prefer to institute an action for negligence in delict rather than assault<sup>108</sup> or breach of contract.<sup>109</sup>

The onus of proof in a negligence suit rests on the plaintiff. He/she must lay sufficient evidence before the court to convince it on a balance of probabilities that negligence was indeed present and that damage<sup>110</sup> arose as a consequence thereof.<sup>111</sup> A medical practitioner who fails to inform the patient adequately of the risks involved, could be held accountable for negligence.

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108 See Strauss and Strydom 1967 *Die Suid-Afrikaanse Geneeskundige Reg* 111. Exceptions to the rule are two important South African cases: *Stoffberg v Elliott supra* and *Esterhuizen v Administrator Transvaal supra*, where damages were awarded on the grounds of assault.

109 Lupton 1982 *Legal Consequences* 142 et seq; See, however *Administrator, Natal v Edouard supra*.

110 Pecuniary loss or infringement of personality.

111 Strauss 1984 *Doctor, Patient and the Law* 281 et seq; Lupton 1982 *Legal Consequences* 144.

The standard used in South African courts to determine medical negligence is at present still that of the reasonable practitioner.<sup>112</sup> It must be proved that the medical practitioner failed to exercise the degree of care and skill that is ordinarily used by the profession under similar conditions and circumstances.<sup>113</sup> Factors which are taken into account are the branch of the profession to which the practitioner belongs, the general level of skill and diligence possessed and exercised at the time by the members of such branch and the nature of the duties the medical practitioner has carried out.<sup>114</sup>

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112 Thus it was stated in *Buls and Another v Tsatsarolakis supra* at 893-4 that "the standard of care required of a medical practitioner who undertakes the treatment of a patient is not the highest possible degree of professional skill, but reasonable skill and care". See also Van der Walt 1979 *Delict* 71; See Van Oosten 1989 *Informed Consent*, who is in favour of a patient-autonomy oriented approach 447, 449, 456 - 457 and 459.

113 In *Van Wyk v Lewis supra* it was for instance stated that: "We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he falls short he is negligent."

114 Van der Walt 1979 *Delict* 721.

As assisted reproductive medicine, particularly in vitro fertilisation and embryo transfer require specialised skills and knowledge, the standard applied by the courts will be that of the reasonable practitioner within the field of assisted reproductive technology.<sup>115</sup> As is the case with negligence suits in general, this poses a problem of proof for the patient who suffers damages. Since assisted reproductive technology is a field of super-specialisation, there are relatively few infertility specialists in the country. It may therefore be extremely difficult, if not impossible, for the patient to find an expert witness willing to give evidence of negligence in court.<sup>116</sup> On the other hand, infertility specialists are subject to the disciplinary code of the Medical Council and should work in strict compliance with the Human Tissue Act and Regulations. From interviews with infertility specialists in South Africa, it appears that many comply with the 1986 Ethical Considerations of the New Reproductive Technologies supplied

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115 See in general Neethling, Potgieter and Visser 1990 *Law of Delict* 117 - 118 and cases cited at 117 n 79; Boberg P Q R 1989 *The Law of Delict* 346; Van der Walt 1979 *Delict* 71. See also the specific discussion of Lupton regarding the qualifications of a medical practitioner performing in vitro fertilisation and embryo transfer in 1982 *Legal Consequences* 131 - 134 and 144 - 145.

116 For a possible solution to this problem Strauss 1984 *Doctor, Patient and the Law* 287 suggests the institution of a medical ombudsman, who amongst other duties, may constitute a panel of medical experts to assist him/her.

by the ethics committee of the American Fertility Society<sup>117</sup> and the 1990 New Guidelines for the Use of Semen Donor Insemination published by the same society.<sup>118</sup> Furthermore, the Southern African Society for Reproductive Biology was recently founded to enhance the standard of assisted reproductive technology in South Africa.<sup>119</sup> Compliance by a practitioner with these standards will ordinarily avoid an allegation of negligence. The reputation and success rates of each clinic are also important as only those which provide proper services will ultimately remain active.

It is submitted that the requirements for the qualifications of medical practitioners performing in vitro fertilisation and embryo transfer, proposed by Lupton<sup>120</sup> (during 1982) are unrealistic. He submitted that these procedures should be performed only by medical practitioners who had studied at the two world renowned infertility centres at Bourn Hill

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117 1986 Fertility and Sterility 46 3.

118 1990 Fertility and Sterility Supplement 1.

119 Information obtained from the chairman of the Southern African Society of Reproductive Biology.

120 1982 Legal Consequences 145.

Clinic in Oldham, Britain<sup>121</sup> or the Faculty of Medicine at Monash University, Melbourne, Australia.

From interviews with several infertility specialists, it appears that the standard of practice is particularly high in South Africa and that excellent training facilities are available at certain academic hospitals, such as Tygerberg Hospital in the Cape Province.

### 2.3.3 INIURIA<sup>122</sup>

If damages are claimed from a medical practitioner on the ground of iniuria, the appropriate delictual action is the *actio iniuriarum*.<sup>123</sup> For this action to succeed wrongfulness and intent (*animus iniurandi*) must be proved, which may be difficult in assisted reproductive technology. The plaintiff must prove that the actions of the medical practitioners (apart from an infliction of pecuniary loss),<sup>124</sup> also

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121 Where Steptoe and Edwards developed in vitro fertilisation and became world famous with the birth of Louise Brown in 1978.

122 See also the discussion in chapter 3.

123 Ibid.

124 *Damnum iniuria datum* which is instituted by the *actio legis Aquiliae*.

constitutes an infringement of a subjective right.<sup>125</sup>

Lupton, to my mind correctly, states that a medical practitioner who performs artificial insemination/in vitro fertilisation or embryo transfer on a woman without her husband's consent, commits an iniuria against the husband.<sup>126</sup>

In some jurisdictions the question arose whether a child born as a result intercourse resulting in illegitimacy, could hold the medical practitioner liable for an iniuria or the so-called "wrongful life"<sup>127</sup>

#### 2.3.4 WRONGFUL CONCEPTION, BIRTH AND LIFE

In Illinois, in the USA, a child born as a result of an adulterous relationship, instituted an action against his biological father as he averred that he had been born an "adulterine bastard."<sup>128</sup> The father, who was already married, persuaded the mother, on a promise of marriage, to

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125 Neethling, Potgieter and Visser 1990 Law of Delict 272; Neethling J 1985 Persoonlikheidsreg 75 - 78 and Van der Walt 1979 Delict 8.

126 Lupton 1982 Legal Consequences 163 et seq. See, however, Sonnekus 1986 DR 377.

127 See the classification *infra*.

128 *Zepeda v Zepeda* 41 Ill App 2d 240 190 N E 2d 849 (1963) discussed by Boberg P Q R "An Action for Wrongful Life" 1964 SALJ 498 - 502.



have intercourse with him, which resulted in the birth of a child. In his action (instituted through a friend) the child claimed compensation for the stigma and legal disabilities caused by his illegitimacy. The court, in denying the claim, made the following noteworthy statement:

"Encouragement (of such actions) would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain colour, another because of race, one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavoury reputation."<sup>129</sup>

Although the action was referred to as a "wrongful life" action, the judicial outlook has changed over the years. whilst legal terminology is not quite settled at this stage, three broad claims can be distinguished:<sup>130</sup>

- 1 The "wrongful life" claim, generally refers to a claim where a handicapped child is born. The claim is usually

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<sup>129</sup> At 260.

<sup>130</sup> Strauss "First S A Claim Against Doctor for 'Wrongful Conception' Fails" 1988 S A Prac Man 6.

brought by the child himself.<sup>131</sup>

- 2 "Wrongful conception" refers to cases where conception ought to have been medically prevented, for instance in the case of a failed vasectomy.
- 3 "Wrongful birth" refers to the situation where the birth of the abnormal child should have been prevented. The claim is usually instituted by the parents of the abnormal or disabled child.

As yet, we have had only decisions on "wrongful conception" in South Africa. Although these decisions may not strictly relevant to surrogacy, it is important to discuss them briefly.<sup>132</sup>

The first decision on "wrongful conception" in South Africa was handed down in *Behrman and Another v Klugman*.<sup>133</sup> This

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131 Schedler G 1986 "Women's Reproductive Rights: Is There a Conflict With a Child's Right to be Born Free From Defects?" 1986 J Legal Med 357 - 358; Pretorius R in 1988 The Right to Life - Issues in Bioethics 71.

132 For a detailed discussion of the *Behrman* and *Edouard Cases*, see Strauss S A "Voluntary Sterilisation for Convenience: The Case of the Unwanted Child" 1990 *Consultus* 93 - 97.

133 1988 WLD (Unreported). For a detailed discussion of the cases, see Strauss 1988 S A Prac Man 6 - 7; Strauss 1990 *Consultus* 94 - 95.

was a case of a failed vasectomy which resulted in the birth of a normal child. The claim was based on breach of contract and alternatively negligence. The plaintiffs claimed that, from the statements made by the doctor, they believed that the vasectomy was irreversible and would render the husband sterile after ten weeks following the operation. They nevertheless waited 16 to 20 weeks before commencing intercourse. Finding in favour of the medical practitioner, Melamet J concluded that the appellants, on a balance of probabilities had failed to establish that the contract between themselves and the medical practitioner contained an express or implied term or warranty as to the permanent success of the operation.

*Edouard v Administrator, Natal*<sup>134</sup> followed shortly after the *Behrman* case. The facts in *Edouard's* case differ from the *Behrman* case in that the medical practitioner simply failed to perform a tubal ligation on Mrs Edouard at the birth of the couple's third child despite an agreement between the appellants and the provincial administration for the performance of such an operation. In the provincial court the Edouards were successful in their first claim for the cost of maintenance of the child from the date of her birth to the age of 18 years. The court however disallowed damages

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134 *Supra*. See the discussion in Strauss 1990 *Consultus* 95 et seq.

on the second ground, namely discomfort, pain and suffering and loss of amenities of life, suffered by the wife as a consequence of her pregnancy and the subsequent birth of the child.

On appeal this decision was unanimously upheld by a full bench of the the Appellate division in *Administrator, Natal v Edouard*.<sup>135</sup> Thus a "pregnancy claim" - as Van Heerden J A referred to it - or wrongful-conception claim was acknowledged for the first time by the Appellate Division.

In the Appellate Division the first claim for patrimonial loss was allowed on the ground of breach of contract but the second claim, for intangible loss, was denied. In allowing the first claim, the court pointed out that the award in no way transfers the support obligation from the father to the doctor or hospital, but that in a case like this, where the sterilisation was requested for socio-economic reasons, the award could help the father to fulfill the support obligation. The court further stressed that different considerations could apply where sterilisation was sought for other reasons than socio-economic.

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135 *Supra*; See the discussion by Strauss 1990 *Consultus* 96 - 97.

From this decision it is clear that our courts now recognise a claim for "wrongful conception". The socio-economic position of the couple will, however, play a prominent role in the decision.

### 2.3.5 LIABILITY UNDER THE NASCITURUS FICTION<sup>136</sup>

The general rule in South African law is that legal subjectivity commences when a child is born alive. At that moment the child attains the capacity and status of a person and becomes the bearer of juridical competencies, rights and legal obligations.<sup>137</sup> There is, however, one exception to this rule by virtue of the so-called nasciturus fiction<sup>138</sup> in terms of which legal protection can be backdated to conception when, to do so, would be to the benefit of the child, on the condition that the child is born alive.<sup>139</sup> In

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136 See, however, Van der Vyver J D and Joubert D J 1985 *Persone-en Familiereg* 68 et seq who refers to the nasciturus rule. In their opinion the rule means that legal subjectivity is, under certain circumstances, pre-dated to conception.

137 Boberg 1977 *Law of Persons and the Family* 8 - 9; Van der Vyver "The Legal Status of the Homo Novus" in 1980 *Genetics and Society* Oosthuizen, Shapiro and Strauss (eds) 92 - 3; *Christian League of Southern Africa v Rall* 1981 2 SA 821 O at 829 - 830; *Pinchin & Ano N O v Santam Insurance Co Ltd* 1963 2 SA 254 W at 260.

138 *Nasciturus pro iam nato habetur quotiens de commodo eius agitur* (Digesta 1 5 7 & 1 5 26).

139 Cronjé D S P 1990 *Barnard Cronjé and Olivier - Die Suid-Afrikaanse Persone- en Familiereg* 29.

terms of this fiction, the court will allow a child who suffered injuries in utero through the negligence of a third party, the right to sue for damages, provided causality and negligence can be proved.<sup>140</sup> There is no reason why this fiction should not apply in the field of assisted reproductive procreation. If a zygote or foetus is injured during assisted reproductive procreation, but is not born alive, the nasciturus fiction will, however not apply. The only remedy available to the couple, if they can prove negligence and causality, is damages for hospital expenses. If the child is still-born, they may also claim funeral expenses.<sup>141</sup> One cannot claim for the loss of a potential child as our law does not recognise a right of "ownership" in children nor does it put a value on life per se.<sup>142</sup>

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140 *Pinchin v Santam supra*. For a discussion of this case see: Van der Merwe N J and Joubert W A *Vonnisbespreking (Twee benaderings)* 1963 (26) *THRHR* 291 - 297.

141 See Strauss 1984 *Doctor, Patient and the Law* 198; Lupton 1982 *Legal Consequences* 155.

142 Strauss 1984 *Doctor, Patient and the Law* 198; Lupton 1982 *Legal Consequences* 155.

## 2.4 "OWNERSHIP" IN GAMETES AND ZYGOTES/EMBRYOS?

### 2.4.1 INTRODUCTION

The question of "ownership" is relevant to a discussion of liability, since pecuniary loss and/or the infringement of a right of personality are essential elements in a claim for damages. The nature of the rights is therefore important.

The question of "ownership" in gametes or embryos - particularly frozen embryos - leads to a myriad of legal problems.<sup>145</sup> The question is closely linked to the controversial question of when life begins. There is no consensus on this issue, which is largely of a philosophical and religious nature. From a legal perspective the question is rather "how and when should life be protected?"

If one cannot claim "ownership" of a child, can one claim "ownership" of gametes, zygotes or embryos?<sup>146</sup> Although

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145 Examples are the recent case in Knoxville (Tennessee) where a couple who had seven embryos in cryopreservation decided on a divorce. The wife wanted "custody" of the embryos, whereas the husband wanted to prevent his wife from obtaining the embryos for implantation. Information obtained from *The Pretoria News* 08-08-1989.

146 1989 Crimes against the Foetus The Law Reform Commission of Canada Working Paper 58 at 8 defines the gamete as a germ cell - in the male, a sperm and the female an egg or oocyte. The zygote is the fertilised egg - resulting from the fusion of sperm and egg. The embryo refers to the stage of development between

(Footnote Continued)

there is no "ownership" of a child, children are nevertheless protected as legal subjects. Should the same be true of the foetus, which is a potential child?

Gametes differ from other human tissue which may be donated or transplanted in the important respect that they contain readily utilisable genetic information - a gamete has the potential of becoming a human being.<sup>147</sup> Although most legal systems do not recognise proprietary rights in a human body as such, a person has the right to decide what to do with his/her body, tissues, organs or gametes after death or once they have been removed from the body as long as such a decision is not *contra bonos mores* or in conflict with the provisions of statutory requirements, such as the Human Tissue Act.<sup>148</sup>

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(Footnote Continued)

fertilisation and completion of basic organ development. The foetus refers to the stage of development following the embryonic period and continuing until birth or abortion. In a discussion of this kind, a clear distinction should be drawn between gametes (sperm and ova/oocyte) on the one hand and the zygote, embryo or foetus on the other hand.

147 Jansen R P S "Sperm and Ova as Property" 1985 J Med Ethics 123 - 126.

148 See Strauss 1984 *Doctor, Patient and the Law* 163 et seq.



As a general rule, solid organs may not be sold<sup>149</sup> whereas it is not uncommon for donors of blood or gametes to receive compensation. This is not for the blood or tissue as such, but rather for the inconvenience and necessary expenses.

#### 2.4.2 AN OVERVIEW OF FOREIGN JURISDICTIONS

##### 2.4.2.1 UNITED STATES OF AMERICA

In 1973 the question of ownership arose in the case of *Del Zio v Manhattan's Columbia Presbyterian Medical Center*.<sup>150</sup> In this case medical practitioners attempted in vitro fertilisation of a woman's ova with her husband's sperm. While the culture was in the incubator, the chairman of the department, without consultation with the physicians or the couple, destroyed it. The couple sued the chairman and the hospital's trustees with conversion of personal property and intentional infliction of emotional distress. The property

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149 Our Human Tissue Act, however, provides for the import and export of human tissue, blood, blood products or gametes under strict regulation. An authorised institution, in terms of the Act, or the importer concerned may receive payment in respect of the import, acquisition or supply such tissues and gametes. See s 28 of the Act.

150 No 74-3558 S D N Y (1978) - discussed by Andrews L "My Body, My Property" 1986 Hastings Center Rept 29; Wadlington W "Artificial Conception: The Challenge for Family Law" 1983 Va L Rev 505 n 147; Wurmbbrand M J "Frozen Embryos: Moral, Social, and Legal Implications" 1986 S Cal L Rev 1092.

claim was rejected by the jury, but damages of \$50 000 were allowed for emotional distress.<sup>151</sup>

In the more recent case of *Davis v Davis*,<sup>152</sup> which has received wide media attention,<sup>153</sup> an estranged couple battled for "ownership" of seven frozen embryos. The classification of the embryos was vital to the case. Are they life or property? Mrs Davis considered them "potential life" whilst her estranged husband considered them "property jointly owned". Young J ruled that human life begins at conception and awarded temporary "custody" to the mother. This ruling was, according to him, in the best interest of the "children". It was decided that child support, visitation and final custody would be decided if birth resulted from the embryo transfer. Ironically, Mrs Davis remarried and changed her mind, saying she wanted to donate the embryos anonymously to an infertile couple. The Tennessee Court of Appeal overturned the ruling of the court *a quo* and referred the case back to Young J to enter a

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151 Andrews 1986 Hastings Center Rept 29 - 30.

152 E-14496 Blount County Circuit Court in Maryville, Tennessee 1989.

153 See for instance Time 27-03-1989 28; USA Today 17-05-1989; New York Times 22-09-1989; Pretoria News 08-08-1989.

judgment giving the parties joint control over the seven embryos and "equal voice over their disposition".<sup>154</sup>

Shortly after the Davis case, another dispute over control of a "pre-zygote" was decided in the USA. In the case of *York v Jones*,<sup>155</sup> a couple sued the in vitro fertilisation programme for control of a frozen "pre-zygote".<sup>156</sup> After having moved to California and several unsuccessful attempts in a Virginia Institute for Reproductive Medicine, the couple requested the transfer of the only remaining zygote to an in vitro fertilisation clinic in Los Angeles. There was a written contract between the institute in Virginia and the couple<sup>157</sup> which stipulated several options, should the couple decide to discontinue the programme or get divorced. The court held that the cryopreservation agreement created a bailment relationship, which imposes an obligation on the bailee (IVF programme) if bailment has terminated, to return

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154 New York Times 14-09-90.

155 *York v Jones* 717 F Supp 421 D C Va (1989) in the US District Court of Norfolk, Virginia. For a detailed discussion see Andrews L "Birth of a Motion" 1990 Student Lawyer 25 - 30 and Rymer T A "Couple sues IVF Program for Control of Frozen Pre-Zygote" 1990 Citation 61 - 62.

156 1990 Citation 61 - 62; Andrews 1990 Student Lawyer 25 - 30.

157 For the details see 1990 Citation 62.

the subject matter to the bailor (couple).<sup>158</sup> This judgment clearly favoured the view that a "pre-zygote" is the personal property of the couple.

#### 2.4.2.2 GREAT BRITAIN

The Warnock Committee in Britain expressed itself firmly against the concept of "ownership" in gametes or embryos. They recommended that:

- 1 semen donors should have no parental right or duties to a child;<sup>159</sup>
- 2 ova donors should have no parental right or duties to a child;<sup>160</sup>
- 3 legislation be enacted to ensure there is no right of ownership in a human embryo;<sup>161</sup>
- 4 when one of a couple dies, the right to use or dispose of any embryo stored, should pass to the survivor;<sup>162</sup>
- 5 when both die, the right should pass to the storage

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158 1990 Citation 62.

159 At 4.22 of the Report.

160 At 6.8 of the Report.

161 At 10.11 of the Report.

162 At 10.12 of the Report.

authority;<sup>163</sup> and

- 6 in the event of a dispute, or the elapse of the time of normal reproductive need, the storage institution or authority should have the power to make decisions on the fate of the embryo.<sup>164</sup>

In a White Paper on Human Fertilisation and Embryology,<sup>165</sup> presented to the British Parliament, the views expressed in the Warnock Report regarding control over gametes and embryos in storage were contested. It was recommended that the "storage authority" should not have the right of use or disposal, unless specifically granted by the donors. Their wishes are paramount during the permitted storage period. After expiry of this period, the "storage authority" may only use gametes or embryos for other purposes with the consent of the donors.

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163 At 10.12 of the Report.

164 At 10.10 and 10.13 of the Report.

165 DHSS Cm 259 HMSO discussed by Parker D "White Paper on Human Fertilization and Embryology" 1988 *Fam Law* 303 - 305; Morgan D "The Human Fertilisation and Embryology Bill: Regulating Clinical Practice" 1990 *Fam Law* 122 - 123.

This recommendation has been followed in the proposed Human Fertilisation and Embryology Bill<sup>166</sup> which upholds patient autonomy. The Bill contains strict consent requirements. Amongst others, the maximum period for storage should be specified, it should be clearly stated what is to happen to gametes or embryos in storage in the event of disputes, death or when a party becomes incapacitated. It is therefore the duty of the consent-giver to address this issue.<sup>167</sup>

#### 2.4.2.3 FRANCE<sup>168</sup>

In a case dealing with posthumous artificial insemination, a French woman, Mrs Parpalaix, sued a government-run sperm bank for the frozen sperm of her deceased husband.<sup>169</sup> The latter had to undergo chemotherapy which could have

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166 Morgan D 1990 N L J 23 - 24. See also the discussion of the Human Fertilisation and Embryology Bill in chapter 2.

167 Morgan 1990 N L J 24.

168 In 1977 a case was also reported in Britain when Kim Casali who is best known for the creation of the "love is..." drawings had a child 17 months after her husband's death; For a discussion see Van der Vyver "The Legal Status of the Homo Novus" 1989 Genetics and Society Oosthuizen Shapiro and Strauss (eds) 88.

169 The Parpalaix case, discussed by Atherton R "Artificially Conceived Children and Inheritance in New South Wales" 1986 Austl L J 374 - 386; Deutsch E "Parpalaix et al v C E C O S" 1985 Med Law 299 and "Current Topics" 1984 Austl L J 627 - 628; Jones D "Artificial Procreation, Societal Reconceptions: Legal Insight from France" 1988 Am J Comp L 525 - 545.

rendered him infertile. Although she did not succeed in her first attempt, the decision was later overruled by three judges in a suburban court in Creteil<sup>170</sup> which ordered the release of the sperm.

The court clearly stated that sperm is not a "thing in commerce, but secretion containing the seed of life destined for human procreation".<sup>171</sup> With regard to the rights and obligations of the sperm bank, the court found that it had an express obligation to preserve the sperm and an implied obligation to return it to the person for whom it was intended.<sup>172</sup>

#### 2.4.2.4 AUSTRALIA

During 1984 the extremely wealthy Rios couple, who had two embryos in cryopreservation, were killed in a plane crash. This event sparked renewed controversy over the status of the human embryo and the fate of frozen embryos.

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170 Tribulan de Grande Instance de Creteil, 1 Aug 1984 225/84.

171 Jones 1988 Am J Comp L 529.

172 Ibid.

Three possibilities were considered:<sup>173</sup>

- 1 that they are viewed as personal property and passed by the intestate laws of succession to the heirs of the Rios family;
- 2 they could be treated as human beings and a guardian be appointed for them by a court to determine what would be in their "best interest" or
- 3 the hospital, were they were stored, could be recognised as the trustee for the deceased couple and decide their destiny.

The "personal property" view created the difficulty that embryos have no commercial value and even if they did, a determination was impossible to make at that stage.<sup>174</sup>

There was no precedent available and no legislation applicable to the situation.<sup>175</sup>

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173 Smith G P "Australia's Frozen "Orphan" Embryos: A Medical, Legal and Ethical Dilemma" 1985 - 1986 J Fam L 31.

174 Smith 1988 J Fam L 31.

175 Unfortunately the ultimate fate of the embryos could not be determined.



## 2.4.2.5 SOUTH AFRICA

### 2.4.2.5.1 RIGHTS TO GAMETES

#### 2.4.2.5.1.1 LEGISLATION AND REGULATIONS

The Human Tissue Act and the Regulations make provision for the donation of gametes (sperm and ova) under strict control. A gamete is defined in the Act as either of the two generative cells essential for human reproduction,<sup>176</sup> but is excluded from the definition of tissue.<sup>177</sup> Excluded as donors of gametes are minors and anyone who has been declared a habitual criminal in terms of s 286 of the Criminal Procedure Act 51 of 1977 or who is mentally ill withing the meaning of the Mental Health Act 16 of 1973.<sup>178</sup>

The Regulations in terms of the Human Tissue Act provide the donors with a right of determination or decision making<sup>179</sup> regarding their donations. The donor can, for instance, decide on the population group and religion of the

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176 S 1.

177 S 1(a) defines "tissue" as "any human tissue, including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete".

178 S 19.

179 My emphasis.

recipient<sup>180</sup> as well as the number of artificial inseminations for which his<sup>181</sup> gametes may be used.<sup>182</sup> These decisions must be recorded in the donor's file.<sup>183</sup>

The recipient of a donation may also "express wishes regarding the population group and religion of the donor and any other wishes of the recipient concerning such donor".<sup>184</sup> The details of these wishes should also be recorded in the recipient's file.<sup>185</sup>

The Regulations also place a duty on the medical practitioners performing the artificial insemination or in vitro fertilisation to ensure that "the wishes of both the donor and the recipient are respected regarding the population and the religious group of the child to be procreated".<sup>186</sup>

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180 Reg 6(1)(iv).

181 Although this refers to the male, the donor may of course also be a female as "gamete" is defined as "either of the two generative cells essential for human reproduction" in S 1 of the Human Tissue Act.

182 Reg 5(1)(v). The number of births resulting from gametes from one donor is, however, restricted five live births.

183 Reg 6(1)(iv) and (v).

184 Reg 10(1)(a)(v).

185 Reg 10(1).

186 Reg 9(e)(iii).

S 36 of the Human Tissue Act stipulates that the receiver of gametes acquires "exclusive rights" over the gametes used for artificial insemination or in vitro fertilisation. These "rights" in terms of the Act, can however, not be interpreted to include parental rights, as such an interpretation would imply that the donor of sperm in AIH (artificial insemination husband) would lose his parental power by the mere act of providing sperm for the artificial insemination of his wife.<sup>187</sup>

The terminology "exclusive rights" should also not be interpreted as "proprietary rights" or "rights of ownership". It is submitted that the view that the human body - alive or dead - cannot be the object of such rights is correct.<sup>188</sup> Human tissue falls in the category of *res extra commercium* and is not subject to "ownership".<sup>189</sup> A person, however, has the right of determination regarding his/her body, tissues, organs or gametes after death or once they have been removed from the body as long as his/her

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187 Schutte 1986 Hervorming 79.

188 For a detailed discussion on the rights to a corpse, see Van der Walt A "Artikel 10 van die Wet of Menslike Weefsel 65 van 1983 in 'n Juridiese, Etiese en Filosofiese Perspektief" 1984 TSAR 161 - 163. See, however, the view of Strauss 1984 Doctor, Patient and the Law 168 that the keeping of a dead mummy by a museum is a clear exception to the rule that dead bodies are incapable of ownership.

189 1984 TSAR 162; Van der Merwe C G 1979 Sakereg 20.

decision is not contra bonos mores or in conflict with statutory requirements.<sup>190</sup> The Children's Status Act, furthermore clearly stipulates that the donors of sperm and ova have no rights and duties towards a child born through artificial insemination of a woman.<sup>191</sup> This enactment protects the child against later claims of guardianship or custody and protects the donors against claims for maintenance.

Although there are at present no stipulations regarding the storage of sperm or ova,<sup>192</sup> the same principles are applicable.

Once the donors of gametes have relinquished their control to a storage institution or clinic, they should not be permitted to institute later claims. The exception to this general rule, is where gametes are donated for a specific purpose rather than to an anonymous recipient. Examples are AIH (artificial insemination husband) and surrogate motherhood. The intention of the parties is not to relinquish their gametes, but to use them for a specific

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190 For an in depth discussion of the patient's rights to tissue removed during an operation, see Strauss 1984 Doctor, Patient and the Law 163 et seq.

191 S 5(2). See the discussion in chapter 5 under the Children's Status Act.

192 The Regulations are at present under review. See GG 13228 Notice 433 17-05-1991.

purpose. It is therefore submitted that in surrogacy - particularly in complete surrogacy, where the gamete donors are also the intended parents and the surrogate merely acts as a host mother - the intended parents, and not the gestational mother should retain parental rights to the child.<sup>193</sup>

Posthumous artificial insemination or insemination of a widow after her husband's death, provides several legal obstacles which are not discussed here.<sup>194</sup> Her rights to the frozen semen is, however, relevant to this discussion. Where semen is stored for a clear and specific purpose, or an instruction for the release of the semen is made in a valid will, the widow should be entitled to the semen. To protect the interest of society and other children in the marriage - especially in the field of inheritance and succession - a time limit should be set for the release of the sperm.<sup>195</sup>

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193 See the discussion in chapter 5 under the Children's Status Act.

194 For a discussion, see Pretorius R in 1988 *The Right to Life: Issues in Bioethics* W S Vorster (ed) 75 - 76.

195 Ibid.

#### 2.4.2.5.2 RIGHTS TO EMBRYOS

The *nasciturus* fiction, already discussed, provides protection to the unborn who suffers injuries in utero through the wrongful act of a third party, provided causality can be proved and a live birth occurs.

At present the storage of embryos is not legislatively regulated in South Africa, but the embryo is not regarded as a person, neither is it the "property" of the donor or recipient.<sup>196</sup>

The Medical Research Council has provided some ethical guidelines with regard to embryos, which are not binding on a court and carry no penalties for non-compliance. The nature of the "rights" towards embryos are, however not defined, but the guidelines contain a statement that embryo research is not permitted without the written permission of the donors of the gametes or the embryo.<sup>197</sup> S 39A of the Human Tissue Amendment Act 51 of 1989 which came into

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196 See also Silva-Ruiz "The Legal Position of the Embryo and Foetus" 1988 Prague Conference Report of the World Association of Med Law 314.

197 At 27.

operation on 2 May 1990<sup>198</sup> now prohibits genetic manipulation (outside the human body) of gametes or zygotes.

#### **2.4.3 CONCLUSIONS AND RECOMMENDATIONS REGARDING RIGHTS TO GAMETES, ZYGOTES AND EMBRYOS**

The extent and nature of the rights to gametes, zygotes and embryos remain largely uncertain. Court decisions in other jurisdictions do not provide uniform answers.

Donors of gametes have a right of determination, but once they have relinquished this right by donation, they cannot institute claims later. The exception, which has already been recognised statutorily, is when the gametes are donated for a specific purpose. Another exception which should be recognised is that of surrogate motherhood, where the intent of the parties should be the paramount consideration and the specific intent of the agreement recognised.

It is submitted that "rights" to gametes referred to in the Human Tissue Act and the Children's Status Act are not in the nature of rights of ownership (eiendomsreg), but are at best rights of disposition or determination (beskikkingsreg).

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198 GG 12435 No 80 27-04-1990.

The intent of the parties should also be paramount in any decision regarding the rights to a zygote, foetus or embryo. In support of the Human Fertilisation and Embryology Bill in Britain, it is submitted the intended parents, should have the exclusive right of decision making unless they relinquish it (in writing) to the storage facility or infertility clinic.<sup>199</sup>

At the time of cryopreservation, a written contract should be concluded between the intended parents and the storage facility/clinic in which the couple should provide clear instructions concerning the destiny of the embryos. They should make clear provision for events such as death, divorce or impossibility of completion of the process. The role of the medical practitioner is to assist them by ensuring that their decision is fully informed. The various options and risks should be explained to them. The time limit for storage - approximately four years - should be stipulated. On expiry, the situation should be reviewed by the couple in consultation with the medical practitioners, who are the best judges of the quality of stored zygotes or embryos.

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199 See in general Robertson J A "Decisional Authority Over Embryos and Control of IVF Technology" 1988 *Jurimetrics* 285 - 304 for strong arguments in favour of patient autonomy instead of state intervention.



It is submitted that donation of the embryos to childless couples is a far better option than the destruction of the embryos or so-called "custody battles" as happened in *Jones v Jones* in the USA.<sup>200</sup> It is therefore submitted that a provision inserted in the contract that should the parties fail to come to a decision within two weeks after the date of expiry, the right of determination should pass to the storage facility/clinic.

Although protection should undoubtedly be provided for zygotes or embryos in storage, they should not be afforded legal subjectivity. The autonomy of the mother should be protected at all costs. To accord the foetus equal rights could lead to severe conflicts of interests.<sup>201</sup>

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200 See discussion *supra*.

201 For a discussion of several court cases where an order was granted by the court in favour of the medical practitioners to "save" the life of the foetus - eg blood transfusion to the foetus of a mother who is a Jehovah's Witness and a Caesarian section against the wishes of the mother who belonged to a Laotian tribe, see Hirsch H L "Mother v. Fetus: The Dilemma" 1989 L Aspects Med Prac 5 - 8; Feldman W S "The Rights of the Fetus v. the Rights of the Mother" 1988 L Aspects Med Prac 8 - 10; Field M "Controlling the Woman to Protect the Fetus" 1989 L Med & Health Care 114 - 129.

## 2.5 CRIMINAL LIABILITY IN TERMS OF THE HUMAN TISSUE ACT AND REGULATIONS

In the discussion of the legality of the contract, the relevant sections of the Human Tissue Act and Regulations were discussed.<sup>202</sup>

From the medical practitioner's point of view it is imperative to work within the framework of the Human Tissue Act and Regulations. Failure to comply with statutory requirements could render him/her criminally liable. Although the possible fines for non-compliance are low,<sup>203</sup> the Medical Council could of course, in a disciplinary hearing, impose its own penalties on the medical practitioner.

AIH (artificial insemination with the husband's sperm) provides few legal obstacles. With the exception of Reg 11,<sup>204</sup> the Regulations, do not apply.

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202 See chapter 3.

203 The penalty for non-compliance with the Human Tissue Act is a fine not exceeding R2 000 or to imprisonment not exceeding one year or both. Non-compliance with the Regulations carries a fine not exceeding R1 000 or imprisonment not exceeding six months.

204 Reg 11 entitles a medical practitioner who has been registered with the Director-General in terms of Reg 11(2), to effect artificial insemination under conditions determined by the Director-General and premises approved by him/her.

AID (artificial insemination with donor sperm) and ET (embryo transfer) are, however, more complicated procedures and are regulated in detail. Apart from the detailed requirements regarding donor and recipient files, the artificial insemination procedure itself, confidentiality, registers and notification to the Director-General, important policy issues are also contained in the Act and Regulations.

Only medical practitioners or someone acting under their supervision may perform artificial or in vitro fertilisations and embryo transfer.<sup>205</sup>

Artificial inseminations and in vitro fertilisations may be performed only on married women, with the written consent of their husbands.<sup>206</sup> "Married" in terms of the Act includes "a marriage by way of a contract which, in terms of any Act or by customary law, constitutes a marriage" and "husband", "wife", "spouse" or "married couple" have corresponding meanings".<sup>207</sup> This provides an opportunity for women in a "customary law marriage" to be artificially inseminated.<sup>208</sup>

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205 S 23(2) and Reg 3.

206 Reg 8(1).

207 Reg 1.

208 See Pretorius R "Practical Aspects of Surrogate Motherhood" 1991 DJ 52 - 62 61.

In terms of the Human Tissue Act, artificial inseminations and in vitro fertilisations may be performed only for "medical purposes".<sup>209</sup> The question posed is whether artificial insemination or in vitro fertilisation in surrogacy arrangements contravene this provision. The surrogate mother is a healthy person, but consents to the procedure for the benefit of the intended parents and not herself. In this sense, it is not a therapeutic procedure. To my mind, a wide interpretation should be afforded to the words "for medical purposes". Medical practice is not merely directed at the relief of diseases, but to a great variety of forms of physical and mental suffering. An example is the donation of blood by a healthy person for the benefit of another. If artificial insemination or in vitro fertilisation is therefore performed to relieve the suffering of the infertile couple, it is, to my mind, performed for "medical purposes".

Similar to the regulations regarding the screening of donors,<sup>210</sup> detailed provisions are made for recipient files and information stored on such files.<sup>211</sup> These include

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209 For a discussion of "medical purposes" in the Act, see Schutte 1986 Hervorming 75 et seq.

210 See discussion *infra*.

211 Reg 9 and 10.

personal details,<sup>212</sup> family history,<sup>213</sup> results of medical examinations,<sup>214</sup> previous artificial inseminations,<sup>215</sup> tests and informed consent papers.<sup>216</sup> Thorough screening (physically, socially and mentally) of the recipients is also prescribed.<sup>217</sup>

Recipient files must also be kept in safe custody<sup>218</sup> and confidentiality maintained<sup>219</sup> and certain confidential information, such as the recipient's identification number, the file number, date of successful artificial insemination and the results of pregnancy, if known, must be made available to the Director-General annually.<sup>220</sup>

A medical practitioner who has effected an artificial insemination must report the event and the date within

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212 Reg 10(1)(a)(i).

213 Reg 10(1)(a)(ii).

214 Reg 10(1)(a)(iii).

215 Reg 9(c).

216 Reg 9(d).

217 Reg 9(e)(ii).

218 Reg 10(2)(a).

219 Reg 10(2)(b).

220 Reg 10(2)(c)(i) - (v).

thirty days to the practitioner who handled the donation.<sup>221</sup>  
 If the child is born with a genetic defect or mental disorder, the medical practitioner must attempt to determine the cause and if it could be traced to the donor, he/she must notify the practitioner who handled the donation.<sup>222</sup>

The Human Tissue Act provides a safeguard against possible civil and criminal liability to medical practitioners who have removed tissue in "good faith" for certain procedures described in s 19 of the Act. Artificial insemination is included by virtue of s 19(c). If the donation made or the consent given is subsequently found to be invalid, the medical practitioner will not be liable.<sup>223</sup> A cautionary measure is contained in s 35(2) where it is clearly stated that the section should not be construed to extend existing principles of civil and criminal liability. It is submitted that where there is a clear duty in assisted reproductive medicine, for instance, to ensure that the recipient is married and that her husband has consented to the procedure, the medical practitioner will not escape criminal liability by relying on this section as his actions are negligent.<sup>224</sup>

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221 Reg 12(1)(a).

222 Reg 13(1)(a) - (b).

223 S 35.

224 In terms of s 35(2), it is clear that existing  
 (Footnote Continued)

From the above it is clear that medical practitioners and particularly infertility specialists could be criminally and civilly liable to the surrogate mother, her husband as well as the intended parents.<sup>225</sup>

#### 2.5.1 PATHOLOGISTS<sup>226</sup>

In certain instances the infertility specialists obtain gametes from private or hospital pathologists. They are responsible for the testing and possible storage of gametes as well as screening for genetically transferable diseases and blood, urine or tissue tests. This undoubtedly places a serious responsibility on pathologists regarding the screening of donors.

Apart from the general principles of delictual liability, already discussed, pathologists may also be criminally liable for failure to comply with the Human Tissue Act Regulations.

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(Footnote Continued)

principles of civil and criminal liability are nevertheless applicable.

225 As discussed *supra* under Liability of Infertility Specialists in Assisted Reproductive Technology and Specifically Surrogacy.

226 See chapter 2 under the Suitability of the Parties to a Surrogacy Agreement and Screening.

The Regulations provide clear guidelines regarding donors. Amongst the most important duties of medical practitioners responsible for the withdrawal, screening and storage of gametes are:

The opening of a donor file and allocating an identification number to it.<sup>227</sup> The filing of certain particulars and obtaining documents. Written consent should be obtained to a physical examination and interview by the medical practitioner,<sup>228</sup> the taking of samples, for the purpose of testing, analysing or other processing, which may be necessary. The donor should provide a written declaration of any previous donations, if any, and where they took place.<sup>229</sup> The written consent of the donor's spouse should also be obtained and filed.<sup>230</sup>

Prior to obtaining gametes, the medical practitioner must ascertain whether the prospective donor was screened at least one year prior to the donation for:

- 1 sexually transmitted diseases;

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227 Reg 4(a).

228 Reg 4(d)(i) and (ii).

229 Reg 5(c).

230 Reg 5(d).



- 2 sperm analysis, and
- 3 if it is a female donor, a gynaecological examination.<sup>231</sup>

The results of examinations and tests should be filed in the donor's file.

At present we are confronted with the additional possibility of the dreaded AIDS virus being transferred by using semen from an HIV carrier.<sup>232</sup> An incident was recently reported where a surrogate mother transferred the HIV infection to the foetus with the result that neither the surrogate nor the intended parents, who were related to each other, wanted the child.<sup>233</sup>

The freezing of sperm specimens in an in vitro fertilisation programme, has apparently eliminated this risk. It has been established that one can ensure that the donor is disease-free by testing the semen some weeks after

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231 Reg 5(a)(i)(ii) and (iii).

232 It is possible for the virus to be transmitted to a recipient before the donor has become seropositive - a phenomenon which may take up to three months or even longer to occur after the initial infection.

233 Rothenberg K H "Surrogacy and the Health Care Professional" in 1990 Surrogate Motherhood Gostin (ed) 214 and n 117 with reference to Frederick, Delaphena, Gray et al "HIV testing on Surrogate Mothers" 1987 New Eng J Med 1351.

collecting the specimen.<sup>234</sup> Unfortunately the success rate with frozen semen is lower than with fresh semen. Faced with these alternatives, it is doubtful whether any woman would choose the option of a higher success rate rather than careful screening. Those who elect the option of "self-insemination" should therefore bear in mind that they are exposing themselves to an additional danger of sexually transmitted diseases as well as possible genetic abnormalities in the child.<sup>235</sup>

The Regulations provide extensively what information should be recorded on the donor's file.<sup>236</sup> Amongst the most important are the full names, surname, date of birth and identity number,<sup>237</sup> the donor's age, height, mass, eye colour, hair colour, complexion, population group, nationality, sex, religion, occupation, highest educational qualification and fields of interest.<sup>238</sup> Furthermore, the donor's family history, with special reference to possible

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234 See New Guidelines for the Use of Semen Donor Insemination: 1990 of the American Fertility Society March 1990 Supplement 1 7D.

235 Mastroianni L (Jr) "The Key Social Issues Posed by the New Reproductive Technologies: A Physician's Perspective" in 1989 Reproductive Laws for the 1990s Cohen S and Taub N (eds) 438.

236 Reg 6.

237 Reg 6(1)(a)(i).

238 Reg 6(1)(a)(ii).

genetic carrier conditions and mental disorders,<sup>239</sup> and an evaluation of psychological suitability for the purpose of artificial insemination must be recorded.<sup>240</sup> Details of medical tests in respect of possible communicable or infectious diseases and genetic evaluation, where applicable, should also be recorded.<sup>241</sup> Details of each removal or withdrawal of gametes and the date as well as details of each artificial insemination affected with these gametes should be recorded.<sup>242</sup> The donor's file must be kept in safe custody and must not be destroyed without the written permission of the Director-General.<sup>243</sup> The information regarding the donor's physical features<sup>244</sup> must be made available to the recipient and her husband. Certain information must also be made available to the medical practitioners who perform the artificial insemination or in vitro fertilisation.<sup>245</sup> This excludes the full names, surnames, date of birth and identity numbers of donors.

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239 Reg 6(1)(a)(iii).

240 Reg 6(1)(c).

241 Reg 6(1)(b).

242 Reg 6(1)(d).

243 Reg 6(2)(a).

244 Reg 6(1)(a)(ii).

245 Reg 6(1)(a)(ii) to (v), (b) and (c) as well as the identification number of the donor file (Reg 4)(a).

Certain information must be made available to the Director-General annually on a confidential basis.<sup>246</sup> Absolute confidentiality must otherwise be maintained and information made available only if a law makes provision therefor or a court makes an order to that effect.<sup>247</sup>

Reg 6(2)(f) restricts the number of artificially produced births with one particular donor's sperm to five. Once this number has been reached, the fact must immediately be recorded in red ink on the donor's file. It is then also the duty of the medical practitioner immediately to destroy all the remaining gametes of that donor, whether they are in his/her possession or in the possession of other medical practitioners. If he/she wishes to keep such gametes, substantiated representations must be made to the Director-General, who has a discretion to consider and decide on the matter.

### 3 CONCLUSION

The medical profession in South Africa has achieved high standards of professionalism and technical skill<sup>248</sup> and

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<sup>246</sup> Reg 6(2)(d).

<sup>247</sup> Reg 6(2)(e).

<sup>248</sup> Examples are the first successful heart transplant  
(Footnote Continued)

infertility treatment is no exception. Unnecessary interference by the legislature with over-regulation and additional penal sanctions should not be encouraged.

For those who have suffered harm as a result of the negligence of a medical practitioner in the field of assisted reproduction, the general principles of delictual liability combined with peer review from the Medical Council and the Southern African Society of Reproductive Biology, provide sufficient protection.

The principles of criminal liability are also well established and statutory requirements in terms of the Human Tissue Act and Regulations, well defined.

The rights of the parties to gametes, zygotes, embryos and fetuses are, however, not absolutely clear. These rights are not proprietary rights, but rather rights of determination. The rights of gamete donors are terminated by donation unless the donation is made for a specific purpose, such as AIH (artificial insemination husband). It is submitted that surrogacy should also be classified as a

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(Footnote Continued)

operation by Prof C Barnard in 1967 and the birth of the surrogate Tzaneen triplets, carried by their grandmother in October 1987.

donation for a specific purpose and that the intent and autonomy of the parties be respected in this regard.

Other health-care professionals such as pathologists and psychiatrists<sup>249</sup> have an important role to play in surrogacy arrangements. Their services should be utilised so that the responsibility for decisions on assisted reproduction is shared. In this regard, interdisciplinary decision-making should be encouraged.

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249 See chapter 2 under the discussion of Assistance by Psychiatrists/Psychologists.

## CHAPTER 7            CONCLUSIONS

### 1            OBJECTIVES AND OUTLINE

The principal objective of this final chapter is to present the main conclusions of this work as recommendations regarding the practice of surrogate motherhood in South Africa.

The fundamental aspects of the surrogacy agreement are highlighted and recommendations put forward as to how each of these should be addressed in South African law.

From the outset it should be stated that recommendations are based on the premise that over-regulation is impractical and that one should rather attempt to utilise existing law (common and statutory) wherever possible. Only in situations which are uncertain at present or which contain anomalies, should legislation be enacted or existing legislation amended. The welfare of the child should remain the paramount consideration.

## 2 THEORETICAL APPROACHES IN DEALING WITH SURROGACY

There are two broad approaches to surrogacy,<sup>1</sup> namely:

- 1 The private ordering approach, whereby the intent of the parties is respected; and
- 2 The state regulation approach, whereby the intent of the parties is subject to mandatory normative standards of conduct prescribed by the state.

In the former approach, legislation will nevertheless play an important role - albeit not in a prescriptive form - in facilitating the procedures or practice, where necessary. This approach envisages a facilitative and non-judgmental legal regime where either actively or passively, the law permits people to arrange their own affairs.<sup>2</sup> It is sometimes also referred to as the laissez-faire approach.<sup>3</sup>

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1 1985 Ontario Law Reform Commission Report Vol 1 106 et seq.

2 1985 Ontario Law Reform Commission Report 107.

3 See Lupton M L "The Right to be Born: Surrogacy and the Legal Control of Human Fertility" 1988 DJ 48, who submits that it is unlikely that the South African authorities will support an approach which may lead to the commercialisation of surrogacy.



In the state regulation approach, on the other hand, perceived public values, which are postulated from the outset, are paramount and override the intent and wishes of the parties. Examples are the prerequisites for adoption, set out in the Child Care Act<sup>4</sup> and the prerequisites for legal abortion in the Abortion and Sterilization Act.<sup>5</sup>

The options inherent in the two broad approaches are:

- 1 maintaining the status quo;<sup>6</sup>
- 2 regulating the practice;
- 3 discouraging the practice; and
- 4 prohibiting the entire practice as such or certain forms thereof.

These options may also be combined so that the status quo is maintained in certain well-established areas whereas uncertainty in other areas is removed by way of legislation. Where loopholes or anomalies exist, existing legislation may be amended.

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4 74 of 1983.

5 2 of 1975.

6 See Lupton 1988 DJ 48 who correctly points out that this approach is not without drawbacks. The inadequacy and uncertainty which are evident at present will remain and the child could be the victim of the uncertainty.

Other approaches, with a similar content to those already discussed, are:<sup>7</sup>

- 1 The static approach, which is one of inaction or maintenance of the status quo;
- 2 the inducement approach, which contains a kind of quid pro quo. If the parties agree to follow prescribed practices and procedures, the state will, for instance, respond by providing legitimacy to the child; and
- 3 the punitive approach, which is hostile to all forms of surrogacy arrangements. Bills proposed under this model envisage penalties for professional matching services and punishment for the participants to a surrogacy agreement.

### 3 THE PRACTICE OF SURROGACY IN SOUTH AFRICA

The status quo regarding surrogacy arrangements in South Africa is far from satisfactory at present. There are severe legal pitfalls and anomalies inherent in the procedure which should be revised. To maintain the status quo would amount to turning a blind eye to developments in the field of

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7 Alto Charo R "Legislative Approaches to Surrogate Motherhood" 1990 *Surrogate Motherhood* Gostin (ed) 97 et seq.

assisted reproduction and as Lupton<sup>8</sup> remarks "it would be to squander an opportunity to plan for the future".

Surrogacy is not directly regulated, but the practice is indirectly affected by legislation such as the Human Tissue Act<sup>9</sup> and Regulations,<sup>10</sup> the Child Care Act,<sup>11</sup> the Children's Status Act<sup>12</sup> and the Births, Marriages and Deaths Registration Act.<sup>13</sup> There are certain common law principles which are well established and which may be utilised with good results in surrogacy, for instance the criterion of the best interest of the child. Certain established common law principles, which were previously helpful, such as the *mater semper certa est* approach, have become inadequate in their application in assisted reproductive technology.

#### 4 KEY ISSUES IN SURROGACY

Each issue is first discussed followed by a recommendation as to how it should be addressed in South African law.

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8 1988 DJ 48.

9 65 of 1983.

10 No R 1182 20-06-1986.

11 74 of 1983.

12 82 of 1987.

13 18 of 1963.

#### 4.1 ARTIFICIAL INSEMINATION PROCEDURES

The procedures utilised in surrogacy are artificial insemination - performed either by the woman herself or by medical practitioners. In vitro fertilisation and embryo transfer are utilised in full surrogacy, where the donors are the intended parents or where male and female gametes of third parties are donated.

The advantages of these medical procedures are that they can be regulated to a large extent. The same is not true of the so-called "self-help" inseminations or agreements to physical intercourse between the requesting father and the surrogate mother, who may risk her life and the lives of the children conceived, if donors are not carefully screened for sexually or genetically transmitted diseases.

##### 4.1.1 RECOMMENDATIONS

Medical practitioners, and more specifically infertility specialists, should be permitted to assist couples who turn to surrogacy as a final resort. It would serve no purpose to prohibit medical practitioners from utilising artificial insemination or in vitro fertilisation for the purpose of impregnating a surrogate mother. Adequate historical proof exists that certain social issues cannot be resolved by a

total prohibition.<sup>14</sup> Such an action could drive the procedure underground and create even greater risks and dangers for the parties, who would then be deprived of the assistance of experts in this field. It could also jeopardise the child's general health and legal status.

Should an already pregnant surrogate mother consult a medical practitioner he/she has an option to treat the patient, unless an emergency situation exists, in which case he/she is obliged to treat the patient.<sup>15</sup>

#### 4.2 ARTIFICIAL INSEMINATION FOR "MEDICAL PURPOSES"

It is stipulated in the Human Tissue Act that artificial insemination should be performed only for "medical purposes".<sup>16</sup>

##### 4.2.1 RECOMMENDATIONS

The words "medical purposes" in the Act, should be accorded a wide meaning.<sup>17</sup> Although artificial insemination is

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14 A good example is the prohibition of alcohol in the USA in the 1920's.

15 See chapter 6.

16 S 19.

17 See chapter 6.

effected on a healthy woman (the surrogate), she consents to the procedure for the benefit of a couple who cannot have children the normal way. The purpose is to alleviate infertility and should therefore qualify as a procedure for "medical purposes".

Artificial insemination or in vitro fertilisation for mere convenience should not be permitted.

#### **4.3 SCREENING OF THE SURROGATE MOTHER AND INTENDED PARENTS**

Careful regulation and screening, which should benefit all the parties to the agreement, are already a well-established practice. Screening plays an important role in protecting the welfare of the child.

Detailed provisions are contained in the Regulations in terms of the Human Tissue Act regarding the suitability of donors and recipients of gametes and the procedures which should be followed. As the Regulations apply to surrogacy, the surrogate mother (recipient) should be screened for physical and psychological suitability. In partial surrogacy, semen of the natural (intended) father is utilised. Like any other donor, he should be screened for physical and psychological suitability. The same screening applies to the natural mother if she is the donor of ova. If the intended mother is not a donor, the Regulations in terms

of the Human Tissue Act are not applicable. At present there is no legislative provision for the screening of the intended mother which is a lacuna in the present legal situation regarding surrogacy.

#### 4.3.1 RECOMMENDATIONS

Screening of donors and recipients is regulated in detail by the Regulations in terms of the Human Tissue Act.

The intended mother should also be screened for physical and psychological suitability. The Regulations could be amended to provide for such screening. Her suitability could be determined with the help of social workers, psychologists or psychiatrists. To my mind the welfare of the child should be considered in advance. Adoptive parents are carefully screened and the same should apply to the intended parents in a surrogacy arrangement. A report on the suitability should be filed with an appropriate court<sup>18</sup> along with other relevant information.

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18 In some overseas jurisdictions, such as Canada, the family court is the ideal place.

#### 4.4 INFORMED CONSENT

Medical practitioners performing artificial insemination and in vitro fertilisation have a duty under both common law and statutory law to provide certain information to the parties to secure their informed consent.

The surrogacy agreement is unique in the sense that the intended parents have already decided to include a third person in the agreement. The medical practitioner's role regarding informed consent is also more specialised.<sup>19</sup>

At present the Regulations require that the parties be informed of all the implications of artificial insemination including the problems that exist with regard to the techniques required, the chances of success, financial aspects, consequences to the marriage and the ethical, psychosocial and educational implications of artificial insemination. The risks attached to the genetic properties of a gamete should also be explained as well as the prognosis regarding the child. They should also be informed that legal advice may be obtained and be alerted to potential legal pitfalls.

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19 See the detailed discussion in chapter 6.



#### 4.4.1 RECOMMENDATIONS

The general principles and statutory provisions relating to informed consent are, on the whole, adequate in dealing with surrogacy. Medical practitioners involved in surrogacy arrangements are in a unique situation since they are not dealing with a single couple, but with two - the surrogate and her husband and the intended parents. In addition to common law principles and statutory requirements regarding informed consent, a written agreement should be concluded between the parties and the medical practitioners. This document should contain detailed information regarding risks and possible complications. All the parties should receive adequate and appropriate information to enable them to appreciate the medical, legal, sociological and psychological aspects so that they may reach a rational decision. The individual consent of the parties should be obtained and each couple informed of the particular risks of the procedure.<sup>20</sup> Informed consent should be obtained for the entire procedure. Medical practitioners should protect themselves against possible liability by:

- 1 not giving a guarantee or assurance that a pregnancy will result from the procedure;

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20 See the detailed discussion in chapter 6.

- 2 not giving a guarantee or assurance that the treatment will result in the birth of a single child;
- 3 not giving a guarantee or assurance that the child will be born free from any physical or mental handicaps; and
- 4 not giving a guarantee or assurance that the pregnancy and childbirth will be free from any complications.

The agreement and relevant consent forms should be filed with the court along with other relevant information.

#### 4.5 LIMITING "SELF-INSEMINATIONS"

It is undeniably difficult to regulate the so-called "self-inseminations". This practice is presumably more popular in Lesbian relationships, where a "couple" want a child, but will not be accepted in an assisted reproductive programme, in the absence of a medical reason for the utilisation of assisted reproductive technology. The woman is further disqualified by the fact that she is not married as required by the Regulations.<sup>21</sup> The circumstances in which the child will be born present the risk of psychological harm to the child.

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21 Reg 8(1).

Self-insemination constitutes a criminal offence in terms of the Regulations, which permit only medical practitioners or someone acting under their supervision to perform artificial insemination, but prosecution is unlikely in practice.

Some women fail to realise the dangers of self-insemination. Attempting this procedure could cause a myriad of medical problems. "Donors" are not screened and there is no guarantee that they are not carriers of a genetic or sexually transmitted disease. Women could even place their lives and the lives of their children so conceived at risk if the donor is, for instance, HIV positive.<sup>22</sup>

#### 4.5.1 RECOMMENDATIONS

Education in this field is necessary. Women should be alerted to the dangers of this procedure for themselves and their children. The importance of genetic screening and screening for sexually transmitted diseases should be emphasised and women should be encouraged rather to consult their medical practitioners in this regard.

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22 Such an incident occurred in 1986 in the USA, discussed by Areen J "Baby M Reconsidered" 1988 Geo J Fam L 1747.

#### 4.6 MARRIED WOMEN

The Regulations prohibit artificial insemination being performed on unmarried women.<sup>23</sup> As this is a policy issue, it should be incorporated in the Human Tissue Act rather than the Regulations.<sup>24</sup>

Public policy in South Africa is undoubtedly in favour of restricting artificial insemination to married couples in stable relationships.<sup>25</sup> If the child's natural parents were not married to each other at the time of the child's conception or birth, or at any time between conception and birth, the child will be illegitimate in South Africa.<sup>26</sup>

An argument which could be raised in favour of admitting single persons to assisted reproductive programmes, is the

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23 Reg 8(1).

24 Schutte M Die Hervorming van die Regsposisie van Buite-Egtelike Kinders met Besondere Verwysing na die Status van Kinders deur Kunsmatige Bevrugting Verwek LLD Unisa 1986 82 n 82.

25 1985 South African Law Commission Report 133; Lupton M L 1982 The Legal Consequences of Artificial Insemination and Embryo Transplantation in Humans D Phil Univ of Natal 1982 377.

26 Spiro 1985 Law of Parent and Child 20; Van der Vyver J D and Joubert D J 1985 Persone- en Familiereg 203; Van der Vyver J D "The Legal Status of the Homo Novus" in 1980 Genetics and Society Oosthuizen, Shapiro and Strauss (eds) 102.

fact that they are permitted to adopt children with the consent of the Minister.<sup>27</sup> To permit adoption and not artificial insemination seems to create an anomaly, although different policy considerations may presumably apply to the respective procedures.

Should a Bill of Rights containing an equal-protection clause be implemented in South Africa, limiting the procedure to married women may prove to be unconstitutional. Women are not treated equally if only married persons are suitable candidates for artificial insemination or in vitro fertilisation. There are, however, the important underlying moral and ethical issues, namely to protect a child or provide him/her with the best possible chances at birth. One writer even suggests that a child is entitled to the social and financial support of two parents.<sup>28</sup>

Giesen<sup>29</sup> is of the opinion that modern reproductive technology should be restricted to married couples in jurisdictions where the illegitimate child does not enjoy the full protection of family law. He remarks that the situation may be different in countries where marriage and

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27 S 17(b) of the Child Care Act.

28 Krause H D "Artificial Conception: Legislative Approaches" 1985 Fam L Q 197.

29 1988 International Medical Malpractice Law 637 - 638.

cohabitation are on an equal footing, with the qualification that the procedures should only be made available to couples in stable and long-term relationships, analogous to marriage.

#### 4.6.1 RECOMMENDATIONS

To a large extent reliance should be placed on the self-regulation of the medical profession. Very few infertility clinics will voluntarily admit single women to the programme, although there are undoubtedly medical practitioners who have no reservations in this regard.<sup>30</sup> In the light of the moral and ethical issues involved, I remain unconvinced that single persons should be permitted to utilise artificial insemination or in vitro fertilisation. In this regard I support the view of the Warnock Commission where it is stated that:<sup>31</sup>

"(W)e believe that as a general rule it is better for children to be born into a two-parent family with both father and mother, although we recognize that it is

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30 In the USA only approximately 10% of physicians performing AID are willing to do so on unmarried women. See Giesen 1988 International Medical Malpractice Law 538 n 38.

31 At 2.11 of the Report. See also Lupton M L "The Right to be Born: Surrogacy and the Legal Control of Human Fertility" 1988 DJ 53.

impossible to predict with any certainty how lasting such a relationship will be".

#### 4.7 ABORTION AND THE SURROGATE MOTHER

The written contract usually contains clauses to the effect that the surrogate agrees to carry the child to the full term of the pregnancy until delivery. She furthermore agrees that she will not try to abort the child once conceived unless the requirements of the Abortion and Sterilization Act<sup>32</sup> have been met, namely when it is the opinion of the physicians that such an action is necessary since the pregnancy might endanger the physical or mental health of the surrogate or the child as envisaged by the provisions of the Act.<sup>33</sup>

The situation envisaged is where the medical practitioners might discover through amniocentesis or other tests, that the child suffers from a severe handicap. The pregnancy could be at an advanced stage and the surrogate might not be prepared for termination, while that is what the intended parents request.

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32 2 of 1972.

33 S 3.

#### 4.7.1 RECOMMENDATIONS

The most equitable way to regulate the situation where one of the parties wants an abortion, but not the other/s is to let the final decision rest with the surrogate. She is after all the person who is carrying the baby and who should have the autonomy to consent to an abortion should it be considered necessary. This aspect should be contained in an Act regulating the procedure.<sup>34</sup>

#### 4.8 PERMISSIBLE FORMS OF SURROGACY

By far the largest number of reported cases, especially in the USA, are partial surrogacy or surrogacy in its original form, where the surrogate mother is also the genetic mother of the child. In these cases the intended mother makes no genetic contribution to the child, but in most instances her husband's sperm is used for the fertilisation.

One of the most controversial issues in surrogacy is the agreement by the surrogate to hand the baby over to the intended parents after birth. This would presumably be more difficult for the surrogate who is genetically linked to the

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34 See the proposed Surrogacy Agreement Bill discussed *infra*.



child than where she is a mere "host" mother who has made no genetic contribution to the child.

Whether only full surrogacy should be allowed and not partial surrogacy, is a complex question because of the moral and ethical issues involved.

#### 4.8.1 RECOMMENDATIONS

It is submitted that full surrogacy, where the intended parents are also the genetic parents, is morally and ethically a more acceptable form of surrogacy. The surrogate mother acts as a "host" or "carrier" with no genetic link to the child and it should, presumably, be easier for her to hand over the child after birth, than in the situation where she is also the genetic mother of the child.

Despite this fact, it is submitted that both forms of surrogacy should be permitted. To my mind, it would be unfair and unreasonable to allow a woman who is capable of producing ova the opportunity of having a child, while denying a woman who is unable to produce ova or carry a baby to term, this opportunity.

The choice to have a surrogate baby is a private and personal one, and those who are not in favour of the procedure, need not utilise it, but their attitude should

not prevent those who have no other options from utilising this option.

#### 4.9 COMPENSATION

The compensation of the surrogate mother is undoubtedly one of the most complex issues.<sup>35</sup> The basic question is whether compensation is for the child or for the services of the surrogate mother.

Compensation for medical and legal fees, which normally form part of a surrogacy arrangement, could be construed as indirect compensation for adoption which is prohibited in terms of the Child Care Act<sup>36</sup> Since the surrogate and her husband are considered the legal parents in terms of the Children's Status Act, an adoption application is likely at present, since it provides the intended parents with the opportunity to secure their rights to the child and to secure the status of the child.

From the reaction of the legislatures in most countries, it is clear that commercial surrogacy, where the surrogate

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35 See chapter 3 under the Boni Mores.

36 Section 24 of the Child Care Act. Pretorius R "Surrogaat-moederskap: Implikasies in die Suid Afrikaanse Regstelsel" 1987 DR 271 - 272.

mother or third parties make large profits, is unacceptable and against public policy. Concern has also been expressed that wealthy women may exploit those who are less fortunate or less advantaged, by compensating them for their services.

The problem, however, remains that the procedure is expensive and in South Africa medical schemes are under no obligation to cover medical expenses related to infertility treatment and artificial insemination.<sup>37</sup> Furthermore, some women are prepared to give up their employment in order to become a surrogate mother. This is more likely to occur where a friend or family member offers to act as surrogate mother.<sup>38</sup> There are furthermore certain necessary expenses involved in pregnancy and birth. Apart from medical and legal expenses, the surrogate also needs maternity clothes and must make regular trips to the medical practitioner or other health care workers.

Compensation should therefore be categorised as:

- 1 payment in the form of profit;
- 2 necessary expenses; and
- 3 payment for lost income.

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37 Reg 4(2)(e)(i) and (ii) in terms of the Medical Schemes Act 72 of 1967 as amended by Reg 3(c) of Reg No 12094 of 15-09-1989.

38 As happened in the case of Jonker/Sanders recently reported in the South African press.

#### 4.9.1 RECOMMENDATIONS

It is recommended that no money should change hands without prior approval by the court.<sup>39</sup>

It is submitted that a surrogate mother should be compensated for necessary expenses. Such compensation should include all expenses with regard to the pregnancy and hospitalisation, medical procedures and services of other professionals. Furthermore, she should be compensated for her loss of income during the pregnancy and post-partum period. A minimum amount could be determined by the court who is in the best position to assess each situation.

It is submitted that it would be wrong to construe compensation to the surrogate as payment for adoption.<sup>40</sup> The intent of the parties, after all, is to compensate the surrogate mother for a direct financial loss and expenses

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39 See the recommendation by the Ontario Law Reform Commission Vol II 254 - 255. Although there was a divergence of views as to what expenses should be permitted, it was agreed that there should be mandatory judicial control over payments as it could prevent exploitation of the surrogate mother.

40 See *In re Adoption Application* reported in 3 WLR 19-06-1987 and 1984 Fam Law 241 C A; *Surrogate Parenting Assoc v Kentucky ex rel Armstrong* 704 S W 2d 209 211 (Ky 1986); *Matter of Adoption of Baby Girl L J* 505 N Y S 2nd 813 Sur (1986), discussed by Moss D C "Surrogate Parenting Debate" 1987 ABAJ 25; Lupton 1988 DJ 44 - 47.

directly incurred. That, in my view, is not compensation for adoption, which may at present be considered a necessary legal step to regularise the legal status of the child. It is, in any event to be noted that s 24(1) of the Child Care Act does not absolutely prohibit payment for adoption, since compensation with the consent of the Minister is possible.

#### 4.10 THE CASE FOR ALTRUISTIC SURROGACY

In *In re Adoption Application*,<sup>41</sup> an English case, the court had to decide whether payments made to a surrogate mother constituted payment for adoption, which is unlawful. The surrogate was paid 5 000 pounds sterling to reimburse her for loss of wages and necessary expenses. After birth the baby was relinquished to the intended parents who applied for adoption. The court concluded that there was no commercial transaction as there was no profit or financial reward. There was no written contract and no lawyers involved until after the birth of the baby. The arrangement was, according to the court, one of trust which was fully honoured on both sides.

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41 Reported in 3 WLR 19-06-1987 31 - 38 and discussed in 1987 Fam L 259 - 260. For a detailed discussion, see chapter 2 under English Court Decisions.

Apart from obtaining an adoption order, altruistic surrogacy seldom ends in court.<sup>42</sup>

During and after the Baby M case,<sup>43</sup> certain prominent feminists in the USA raised strong objections to the practice of commercial surrogacy<sup>44</sup> and pleaded for its total ban.

The main arguments raised were that:

- 1 surrogate mothers are dehumanised to mere "breeders" or "incubators" or "reproductive vessels"; and
- 2 inherent to the practice is a symbolic harm to society, the woman and the child in commercial surrogacy.<sup>45</sup>

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42 In the latest South African case of full surrogacy (Jonker/Sanders) an adoption order was granted on 25 February 1991 despite compensation to the surrogate for necessary expenses.

43 109 N J 396 537 A 2d 1227 1253 1988, discussed in chapters 2 and 5.

44 According to Andrews L "Surrogate Motherhood - The Challenge for Feminists" 1990 Surrogate Motherhood Gostin (ed) 167 and 180 n 3, a brief was filed in the New Jersey court in the Baby M case on behalf of Amici Curiae, The Foundation on Economic Trends et al, (court docket FM-25314-86E), in which several prominent feminists asked for legislation banning commercial surrogacy.

45 Andrews in 1990 Surrogate Motherhood Gostin (ed) 169 et seq.

Macklin,<sup>46</sup> after a careful analysis of the ethical issues and concerns raised by the practice of surrogacy, argues that commercial aspects should be separated from the social arrangement for the purpose of an ethical evaluation.<sup>47</sup> After a careful analysis of the agreement, she concludes that there is nothing inherently unethical about surrogacy. This, however, does not mean that it is good and that it ought to be encouraged or promoted. It simply means that non-commercial surrogacy is morally permissible, and should therefore be permitted.<sup>48</sup>

It is often argued that the surrogate child may suffer psychological harm in later years upon finding out the truth about his/her birth. The same can be said of adoption. In a sense surrogacy may provide more security to the child, which is related to at least one of the parents. Surrogate children are wanted children<sup>49</sup> and are often referred to as "last chance babies".

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46 "Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis" in 1980 *Surrogate Motherhood* Gostin (ed) 136 - 150.

47 Macklin 144 - 145.

48 148.

49 My emphasis.

To quote from the Warnock Report in Britain:<sup>50</sup>

"The bearing of a child for another can be seen not as an undertaking that trivialises or commercialises pregnancy, but on the contrary, as a deliberate and thoughtful act of generosity on the part of one woman to another. If there are risks attached - the generosity is all the greater".

#### 4.10.1 RECOMMENDATIONS

Altruistic surrogacy, where the surrogate mother does not make a profit from the agreement, should be permitted. It is submitted that it holds no potential harm for society or the child and that it enhances the family unit, which is a priority in every society.

#### 4.11 VALIDITY OF THE CONTRACT

The written contract in which the surrogacy agreement is usually contained, is at present of limited value apart from providing sufficient information to the parties to ensure informed consent.<sup>51</sup>

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50 At 8.13 of the Report in the discussion of arguments for surrogacy.

51 See chapter 4 under a Proposed Contract.



Rather than applying principles of the law of contract, the courts, in dealing with aspects of surrogacy in other jurisdictions, have preferred to view commercial surrogacy contracts as unenforceable as being *contra bonos mores*. They preferred to implement principles of family law and treated surrogacy disputes as custody suits, applying the criterion of the best interest of the child as the paramount consideration.<sup>52</sup> In practically all the surrogacy cases to date, the intended parents were awarded custody.<sup>53</sup>

An argument may be raised that, although contracts are rejected, the courts nevertheless indirectly order "specific performance" although not *eo nomine* by forcing the surrogate to hand the child over to the intended parents.

#### 4.11.1 RECOMMENDATIONS

Principles of contract law could play an important role in surrogacy arrangements. Whereas the common law alone cannot

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52 A recent example is the *Baby M II* case in New Jersey, discussed in chapters 2 and 5. The court held that the contract was invalid and unenforceable as it contravened public policy which prohibits commercial transactions in children. The court treated the matter as a custody dispute and awarded custody to the commissioning couple. Instead of relying on the contract, the court applied the principles of family law and based its decision on the welfare of the child.

53 See chapter 2 under Court Decisions.

protect the child's interest adequately, this can be achieved by including specific terms in the contract. In the South African case of *Basetti v Louw*<sup>54</sup> for instance, Margo J was willing to grant an order validating an agreement between the father and mother of an illegitimate child, regarding his maintenance, custody and access. In this case the couple were not prepared to marry and preferred a type of "settlement" agreement. The agreement contained provisions by the father for support of the child by way of an insurance policy.

Examples of contractual terms, which could benefit the child in a surrogacy agreement are, for instance:

- 1 the creation of a trust for the child;
- 2 an agreement by the couple that they will accept the child despite any mental or physical handicaps; and
- 3 a stipulation regarding custody in the case of divorce or death of one or both intended parents.

It is recommended that the pre-birth contract be regarded as a valid and enforceable contract. The intended parents should be accorded full parental rights to the child at birth, provided the contract has received prior approval by

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54 1980 2 SA 225 W.

a court. The court should ensure that all the parties are adequately protected and are suitable candidates on the strength of affidavits filed by medical practitioners and other health-care workers.

Once the court has given its approval, the contract should be a valid document regulating the entire procedure. In this way, the parties are legally bound by the contract and the interests of the child are protected.

An anonymity clause should also be incorporated in the contract to prevent a private incident from becoming a media circus as happened in the **Baby Cotton** case in Britain, the **Baby M** case in the USA, and our own Tzaneen triplets. The surrogate should not be permitted to sell her story to the media unless it is a unanimous decision by everyone involved.<sup>55</sup>

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55 At present, there is nothing which could prevent the surrogate from doing so, as we are well aware from our experience in South Africa with the Tzaneen triplets, when the story was sold to a British newspaper. A similar incident occurred recently in the Tracy Jonker/Ina Sanders surrogacy. Whereas Ms Sanders tried to shun publicity, there was no way in which she could prevent Ms Jonker from keeping it from the media.

#### 4.12 BREACH OF CONTRACT

Should one regard the contract as unenforceable and void, there can be no legal obligations or rights in terms of the contract.<sup>56</sup>

For the purpose of this discussion, the basic premise is that the contract should be enforceable, once it has been approved by the court.<sup>57</sup>

The most common form of breach is refusal by the surrogate to hand the baby over to the intended parents after birth. The surrender of the child is the most complex issue in surrogacy. The notion of a woman giving up a child which she has carried for nine months is considered reprehensible by many people.

It is submitted that the surrogate mother should hand the child over to the commissioning couple after birth. Should the surrogate mother refuse to honour the agreement, the court may order specific performance.<sup>58</sup>

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56 See chapter 3.

57 See the discussion *infra*.

58 See also the Ontario Law Reform Report Vol II 283.

From the surrogate's perspective this seems a harsh and unsympathetic suggestion. This issue, however, needs to be resolved in advance to secure the status of the child. If the surrogate is allowed to keep the child despite her deliberate decision and undertaking to hand it over to the intended parents, they may suffer similar distress and hardship as their hope of having a child which is related to one of them will be frustrated.

#### 4.12.1 RECOMMENDATIONS

It is submitted that the surrogate who is willing to enter into a non-commercial agreement, is aware of the risks involved, especially if she has previously given birth to her own children. Apart from receiving detailed information on the possible risks and complications, surrogacy has received considerable media attention and women who enter into such agreements should, at this stage, be aware of the fact that they may later regret their decision to relinquish the baby. If they nevertheless consent, their consent is informed.<sup>59</sup> As long as the woman is legally competent to consent, she is a competent party to a contract and should fulfil the obligations agreed to in the contract. The fact

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59 For a clear and logical discussion on this aspect see Andrews in 1990 Surrogate Motherhood Gostin (ed) 172 et seq.

that the agreement may result in hardship should not be a factor which negates her consent. Women have the legal capacity to enter into contracts with whom they choose.<sup>60</sup> The fact that there is no guarantee that everything will turn out well, does not affect the legality and enforceability of such contracts.

#### 4.13        RIGHTS REGARDING GAMETES, ZYGOTES, EMBRYOS                  AND FOETUSES<sup>61</sup>

Insufficient attention has been accorded to this important topic in South Africa. The extent and nature of these "rights" remain largely uncertain. Once a donor has relinquished his/her rights of determination<sup>62</sup> to an institution, claims may not be later instituted. The exception is where gametes are donated for a specific purpose, for instance by a husband for the artificial insemination of his wife.

An even more important consideration is the "rights" to embryos in storage (cryoconservation). There is no legislation regulating this procedure at present.

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60    Provided the marital power is excluded if she is married.

61    See chapter 6.

62    My emphasis.

#### 4.13.1 RECOMMENDATIONS

Surplus embryos in an in vitro programme are often kept in storage (cryoconservation) for later use. The intended parents should have exclusive rights of decision-making with regard to these embryos, unless they relinquish these in writing to the storage facility or infertility clinic.

At the time of cryoconservation a detailed written contract should be concluded between the storage facility and the intended parents. The agreement should contain clear instructions regarding the destiny of the embryos in the event of death or divorce of the intended parents or other unforeseen circumstances. Time limits should be set for storage. On expiry the situation should be reviewed by the couple in consultation with the medical practitioners involved. If the couple fail to reach a decision within two weeks after the date of expiry, the right of determination should pass to the storage facility/clinic.

Although zygotes and embryos in storage undoubtedly warrant protection, they should not be accorded legal subjectivity. To provide equal rights to the embryo and the mother could lead to a severe conflict of interests.<sup>63</sup>

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63 See chapter 6.

Pre-birth "donation" of embryos to other childless couples could be regulated in the same way as surrogate motherhood and where the infertility results from the inability to carry a foetus to term,<sup>64</sup> a surrogate mother could carry the foetus for the infertile wife.

## 5 EVALUATION OF THE EXISTING MODELS

The sole application of the state regulation approach is unsatisfactory as the intent of the parties are subject to mandatory normative standards of conduct prescribed by the state. The private ordering approach, whereby the intent of the parties are respected, provides a better solution. It is submitted that the decision to have a child, with the help of assisted reproductive technology, is a private matter, with which the state should not interfere unnecessarily. Legislation still plays an important role in this approach, although not in a prescriptive form, but rather in facilitating the procedures where necessary. The inducement approach which leans more towards the private ordering approach provides a feasible option for the regulation of surrogate motherhood. This approach contains a kind of quid pro quo. Should the parties adhere to prescribed procedures,

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64 This may be due to a congenital or other abnormality of the uterus, after surgical removal of the uterus, other health problems such as (Rh)- incompatibility, severe high blood pressure or diabetes.



for instance filing an initial application containing certain prescribed information with the court, the state will respond by legitimising the agreement and providing legitimacy to the child.

## 6 SUGGESTED AMENDMENTS TO EXISTING LEGISLATION

### 6.1 CHILDREN'S STATUS ACT<sup>65</sup>

This Act was overdue in regulating the legitimacy of children conceived by artificial insemination with donor sperm. The definition of "artificial insemination" in the Act is wide enough to include surrogacy. In terms of s 5(1)(a) children born as a result of artificial insemination with donor sperm and ova (which includes in vitro fertilisation and embryo transfer to a surrogate mother),<sup>66</sup> are now considered to be the legitimate children of the woman giving birth and her husband, provided that he consented to the procedure. This applies to full and partial surrogacy.<sup>67</sup> The notion of *mater semper certa est* and the presumption of paternity or *pater is est quem nuptiae*

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65 82 of 1987

66 S 5(3(b)).

67 See chapters 3 and chapter 5.

demonstrant are now statutorily entrenched in the case of artificial insemination with donor sperm or embryo transfer.

The effects of this provision on surrogate motherhood are totally contrary to the intent and expectations of the parties to such an arrangement and, it is suggested, unsatisfactory with regard to the child. Parental rights are accorded to a surrogate mother and her husband - whether they desire this or not.

Full surrogacy is affected by the Act more drastically than partial surrogacy and the results can be described only as harsh and unfair. In full surrogacy the parental power of both genetic parents is terminated. This is unfortunate as full surrogacy is, to my mind, more acceptable than partial surrogacy, where the surrogate is also the genetic mother of the child.

The Act furthermore confers parental power over the child on the husband of the surrogate, who has played a minor role in the procedure. If an affidavit is signed by the surrogate's husband in which he denies having consented to the procedure, he would not be considered the legal father of the child.<sup>68</sup> Such an action would, however, contravene the

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68 See reg 6(1)(a) in which states that he is "deemed" the  
(Footnote Continued)

requirements in the Human Tissue Act and Regulations, which requires his consent before a medical practitioner may proceed with the artificial insemination. A medical practitioner who wants to safeguard himself against a claim based upon iniuria, would also be best advised to obtain the consent of the husband.<sup>69</sup>

At present the Act makes provision for two exceptions to the termination of rights and duties of donors by means of s 5(2)(a) and (b). If ova of the birth or gestational mother or semen of her husband are used for her (own) artificial or in vitro fertilisation, the rights, duties and obligations which exist under common law, will remain intact. The ratio behind this section is to protect the rights of "donor parents" to their children, resulting from artificial insemination, for instance the husband who provides sperm for the insemination of his wife (AIH) and the woman who provides ova for her own in vitro fertilisation followed by embryo transfer.

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(Footnote Continued)

father of the child if he consented to the artificial insemination and reg 6(1)(b) which contains a presumption of consent until the contrary is proved.

69 See chapter 6.

### 6.1.1 RECOMMENDATIONS

The Children's Status Act was never enacted to regulate surrogacy and should be amended to exclude it from its ambit.

At present s 5 of the Act reads as follows:

"(1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.

(b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.

(2) No right, duty or obligations shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person except where

- (a) that person is the woman who gave birth to that child;  
or
- (b) that person is the husband of such a woman at the time  
of such artificial insemination.

(3) For the purposes of this section ---

"artificial insemination", in relation to a woman --

(a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or

(b) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman, for the purposes of human reproduction;

"gamete" means either of the two generative cells essential for human reproduction".

#### 6.1.2 RECOMMENDED AMENDMENT

A subsection 5(2)(c) could be added to the existing exceptions as follows:

"(2) No right, duty or obligations shall arise between any child born as a result of the artificial insemination of a

woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person

(c) except as is otherwise provided in the Surrogate Motherhood Agreement Act<sup>70</sup>

**7 ALTERNATIVE APPROACH - MAINTAINING THE STATUS QUO WITH REGARD TO THE CHILDREN'S STATUS ACT.**

An alternative to the proposed amendment to the Children's Status Act, is to maintain the status quo with regard to the Act so that the gestational mother and her husband are considered the legal parents of the child. Parental rights must then be transferred to the intended parents utilising adoption, provided the consent of the surrogate and her husband is obtained. The fact that the surrogate's husband, who has played a minor role in the proceedings, can refuse to consent and thus block adoption is untenable.

The intended (natural) parents who desire to adopt the child jointly, could face a further possible obstacle regarding the requirements for adoption. S 17 of the Child Care Act seemingly prohibits the adoption of a child by the intended parents if the child is "born of one of them". It is uncertain whether this refers to the act of birth or the

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<sup>70</sup> See the discussion of the proposed Surrogate Motherhood Agreement Act infra.

genetic link between the child and its parents. Since a man is unable to give birth, it *prima facie* refers to the genetic link. This is strengthened by s 17(b) which permits a widower/widow or an unmarried/divorced person to adopt a child with the consent of the Minister if "the child is not a child born of him or her". A strong argument could, however, be raised that the genetic parents' rights were legislatively severed by s 5(2) of the Children's Status Act and that there is therefore no link between them and the child and no obstacle to adoption.<sup>71</sup>

If the *status quo* is maintained, the whole procedure is clouded with uncertainty. The intended parents - especially in full surrogacy - may risk losing their genetic child, should the surrogate mother change her mind or her husband refuse to consent to adoption. They could approach the court as upper guardian of all minors for help, but this is a costly and cumbersome procedure and success is not guaranteed.

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71 Adoption was indeed permitted in a case of full surrogacy on 25 February 1991 in the Jonker/Sanders surrogacy.

## 8 CONCLUSION WITH REGARD TO LEGISLATIVE APPROACHES

To my mind, if the two possibilities are weighed up, the amendment in the Children's Status Act provides a better solution. The intent of the parties to the agreement is respected and the surrogate child's status secured by the provisions of the proposed Surrogate Motherhood Agreement Act discussed *infra*.

Those who wish to enter into surrogacy agreements should apply to the court for prior approval of the contract and the suitability of the parties. The parties should be free to include terms of their own choice in the (written) contract, provided these are approved by the court. The court should specifically ensure that the child be adequately protected. The parties, particularly the surrogate mother, should also be adequately protected against possible exploitation. Affidavits regarding the physical and mental suitability of the parties should also be examined by the court.

The following terms should form the essentialia of every surrogacy agreement:

- 1 the surrender of the child and the way in which it will take place;



- 2 compensation of the surrogate mother for necessary expenses and if she forfeited her employment, compensation for loss of income during the pregnancy and post-partum period.

Apart from the proposed amendment to the Children's Status Act, certain important aspects of a surrogacy arrangement should be legislatively determined to ensure legal certainty.

The following bill is proposed to regulate the practice of surrogate motherhood in South Africa.

## 9 PROPOSED SURROGATE MOTHERHOOD AGREEMENT BILL

### Definitions

1. In this Act, unless the context otherwise indicates -  
 "assisted conception" has the same meaning as  
 "artificial insemination of a person" in section 1 of  
 the Human Tissue Act, 1983 (Act No. 65 of 1983);  
  
 "child" means a child born of a surrogate mother,  
 conceived through assisted conception;

"court" means a provincial or local division of the Supreme court of South Africa;

"intended parents" means a male and a female person who are married to each other;

"married" means being in the state or condition of being either the husband or wife in a union at common law or customary law, and includes being in such a state or condition according to Hindu or Islamic law;

"surrogate motherhood agreement" means a written document purporting to be an agreement between intended parents and a surrogate mother whereby the parties agree -

- (a) to assisted conception in the surrogate's reproductive organs - by the bringing together of a gamete or gametes of the male person of the intended parents with a gamete or gametes of either the female person of the intended parents or the surrogate mother; and
- (b) that the surrogate mother will carry the foetus so conceived for the pregnancy period and, after the birth of the child, will hand it over to the intended parents;

"surrogate mother" means a married woman who has attained the age of majority and who has entered into an agreement to bear a child conceived through assisted conception for the intended parents.

**Validity of surrogacy agreement.**

- 2.(1) No surrogate motherhood agreement shall be valid unless it has been approved by the court within the jurisdiction of which the contract was concluded, prior to the initiation of assisted conception.
- (2) The court will only approve the agreement if it is satisfied that the provisions made or contemplated with regard to the child are satisfactory and in the best interest of the child.
- (3) Once the surrogate motherhood agreement has been approved by the court, the court is empowered to enforce the terms of the contract should a breach thereof occur.
- (4) Before approving the agreement, the court shall be satisfied that -
  - (a) the assisted conception will be carried out in

accordance with the provisions of the Human Tissue Act, 1983 (Act No. 65 of 1983);

- (b) the parties have entered into the agreement voluntarily and received adequate guidance to enable them to appreciate the probable medical, sociological and psychological as well as the legal consequences of the agreement; and
- (c) the surrogate mother is a married woman who has previously given birth to at least one living child prior to entering into the surrogate motherhood agreement.

#### **Parental rights**

- 3.(1) A valid surrogate motherhood agreement shall have the effect that the parental rights of the surrogate mother and her husband, notwithstanding any other law to the contrary, be terminated at the birth of the child, and the child shall from that moment on for all purposes be deemed to be the legitimate child of the intended parents.
- (2) In the absence of a valid surrogate motherhood agreement, the child shall be deemed to be the legitimate child of the surrogate mother and her

husband in terms of section 5 of the Children's Status Act, 1987 (Act No. 82 of 1987).

- (3) Should an abortion of a foetus conceived through assisted conception be recommended by medical practitioners in accordance with the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975), the decision to consent to such an abortion shall rest with the surrogate mother exclusively.

#### **Compensation**

- 4.(1) No compensation shall change hands in terms of a surrogate motherhood agreement without the prior approval of the court competent to approve the agreement.
- (2) Compensation over and above actual, necessary expenditure and proven loss of income as a result of pregnancy is not permitted.

#### **Jurisdiction**

5. The court competent to approve the surrogate motherhood agreement shall have exclusive and continuing jurisdiction in all matters arising from the agreement.

**Confidentiality**

6. All proceedings of the court in connection with a surrogate motherhood agreement shall be conducted behind closed doors, and the records of the proceedings shall not be open to inspection by any person unless the court so orders.

**Short title**

7. This Act shall be called the Surrogate Motherhood Agreement Act.

## ABBREVIATIONS OF PERIODICALS

ABA J	American Bar Association Journal
Am Acad Psych L Bull	American Academy of Psychology and Law Bulletin
Am J Comp L	American Journal of Comparative Law
Am J Juris	American Journal of Jurisprudence
Am J Psychiatry	American Journal of Psychiatry
Austl L J	Australian Law Journal
Buffalo L Rev	Buffalo Law Review
Bull Am Acad Psychiatry	Bulletin of the American Academy of Psychiatry
Calif L Rev	California Law Review
Can Bar Rev	Canadian Bar Review
Cap U L Rev	Capital University Law Review
CILSA	Comparative and International Law Journal of South Africa
Colum Hum Rts L Rev	Columbia Human Rights Law Review
Colum J L & Soc Probs	Columbia Journal of Law and Society Problems
Current Legal Probs	Current Legal Problems
DJ	De Jure
DR	De Rebus
Emory L J	Emory Law Journal
Fam Advocate	Family Advocate
Fam L Q	Family Law Quarterly
Fam Planning Persp	Family Planning Perspectives
Geo J Fam L	Georgetown Journal of Family Law
Gonz L Rev	Gonzaga Law Review
Harv L Rev	Harvard Law Review
Harv Women's L J	Harvard Women's Law Journal
Hastings Center Rept	Hastings Center Report
High Tech L J	High Technology Law Journal
Int'l J L & Psychiatry	International Journal of Law and Psychiatry
Intern Legal Prac	International Legal Practitioner Psychiatry
Ind L Rev	Indiana Law Review
Iowa L Rev	Iowa Law Review
J Fam Law	Journal of Family Law
J Law Society Scotland	Journal of Law and Society Scotland
J Legal Med	Journal of Legal Medicine
J Med Ethics	Journal of Medical Ethics
J Z	Juristen Zeitung
Ky L J	Kentucky Law Journal
L Institute J	Law Institute Journal
Law Med & Health Care	Law, Medicine and Health Care
Legal Aspects Med Prac	Legal Aspects of Medical Aspects
Marq L Rev	Marquette Law Review
MDR	Monatsschrift fur Deutsches Recht
Med Law	Medicine and Law
Med L J	Medical Law Journal
Medico-Legal J	Medico Legal Journal

Med Sci Law	Medicine, Science and the Law
Medical Trial Tech Q	Medical Trial Technique Quarterly
Monash Univ L Rev	Monash University Law Review
N C L Rev	North Carolina Law Review
Neb L Rev	Nebraska Law Review
New Eng J Med	New England Journal of Medicine
NJLJ	New Jersey Law Journal
New L J	New Law Journal
NYLJ	New York Law Journal
N Z J Obstet Gynaecol	New Zealand Journal of Obstetrics and Gynaecology
N Z L J	New Zealand Law Journal
Pac L J	Pacific Law Journal
Prac Child L Bull	Practitioner's Child Law Bulletin
SALJ	South African Law Journal
S A Med J	South African Medical Journal
S A Prac Man	South African Practice Management
S Cal L Rev	Southern California Law Review
Stell L Rev	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U New S Wales L J	University of New South Wales Law Journal
Univ Rich L Rev	University of Richmond Law Review
Va L Rev	Virginia Law Review
Vand L Rev	Vanderbilt Law Review
Willamette L Rev	Willamette Law Review
Wm Mitchell L Rev	William Mitchell Law Review
Women's Rts L Rep	Women's Rights Law Reporter
W St U L Rev	Western State University Law Review
Yale L J	Yale Law Journal



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